Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DEAN PATRICK J. ROHAN,

Petitioner,

vs.

THE AMERICAN BAR ASSOCIATION, CLAUDE R. SOWLE, JAMES P. WHITE, R. WILLIAM IDE III, BARBARA B. LEWIS, PHILIP D. SHELTON, GEORGE S. GROSSMAN, and BRADLEY J.B. TOBEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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112 pp

QUESTIONS PRESENTED

1. Whether the American Bar Association ("ABA") is immune from judicial review for a denial of "due process of law" when it performs what its Council Policies call a "quasi-judicial function" in the exercise of what New York Court of Appeals Judge Joseph Bellacosa and the ABA Accreditation Committee have identified as delegated authority from state judiciaries to inspect and approve law schools under state law for licensing of attorneys (*i.e.*, "officers of the court")?

2. Whether this Court should exercise its supervisory power in this case, involving important questions of federal constitutional law and an abuse of summary judgment, to reverse the grant of summary judgment and reinstate Dean Rohan's claim under 42 U.S.C. § 1983 for trial by ruling: (a) that as recognized by the ABA Accreditation Committee and New York Court of Appeals Judge Joseph Bellacosa, the ABA acts with delegated state authority from state judiciaries to inspect and approve law schools for attorney licensing purposes (what the ABA Council Policies call a "quasi-judicial function")? (b) that Dean Rohan had protected "property" and "liberty" interests within the meaning of the Fourteenth Amendment? and (c) that the ABA defendants may be held liable under § 1983 because the reasonably foreseeable consequences of their actions were the deprivation of Dean Rohan's "property" and "liberty" interests?

3. Whether this Court should exercise its supervisory authority in this case to correct the failure of judicial independence by the Second Circuit, which instead of deciding that the politically influential ABA (which has a critical role in the selection of federal judges) had to face trial for the denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution (actionable under 42 U.S.C. § 1983), affirmed the grant of summary judgment dismissing Dean Rohan's Complaint by issuing a not-for-publication, not-for-citation "summary order": (a) that was premised on rewriting Dean Rohan's pleaded and proven due process case -- the denial of an opportunity to comment,

reliance on anonymous statements, biased fact-finding and breach of confidentiality in confidential process -- as mere disparagement, (b) that was unsupported by case precedent and contrary to the record -- and thus an abuse of summary judgment -- and (c) that had as its apparent purpose the avoidance of review by this Court?

4. Whether this Court should exercise its supervisory authority to correct the failure of judicial independence by the District Court, which instead of deciding that the politically influential ABA (which has a critical role in the selection of federal judges) had to face trial for the denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution (actionable under 42 U.S.C. § 1983), granted summary judgment dismissing Dean Rohan's Complaint by issuing an unpublished opinion that, based on a jaundiced treatment of the record contrary to summary judgment law, denied the ABA's recognized state action and due process responsibilities?

5. Whether the ABA is engaged in "state action" within the meaning of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 in the inspection and approval of law schools on behalf of state judiciaries for licensing of attorneys (*i.e.*, "officers of the court")?

6. Whether this Court should exercise its supervisory authority because summary judgment may not properly be granted under Rule 56 of the Federal Rules of Civil Procedure on the "fact-intensive" inquiry of "state action" when: (a) New York Court of Appeals Judge Joseph Bellacosa (also an ABA Accreditation Committee Vice-Chairman) has recognized the delegation of state authority to the ABA, (b) the ABA Accreditation Committee has expressly recognized the delegation to the ABA by the state judiciaries to inspect and approve law schools for attorney licensing purposes and (c) a record supporting a "Brandeis Brief" showing that the ABA accreditation decisions are non-reviewed determinations made on behalf of state judiciaries of what under state law is an

approved legal education for Bar admissions (*i.e.*, licensing individuals as "officers of the court")?

7. Whether there is a "property" interest within the meaning of the Fourteenth Amendment to the United States Constitution in a Law School Deanship secured by express agreement with the University President, the established tradition and practice relating to the St. John's Law School Deanship, the contract with the University administration furnishing the "perks" of a Department Chairmanship and the qualitative enrichment of St. John's Law School during the Deanship, all of which established a legitimate claim of entitlement?

8. Whether there is a "liberty" interest within the meaning of the Fourteenth Amendment to the United States Constitution in reputation coupled with professional positions resulting from a lifetime of valuable service to and distinguished achievements in legal scholarship, legal education, the legal profession, government and society?

9. Whether this Court should exercise its supervisory authority because summary judgment could not properly be granted under Rule 56 of the Federal Rules of Civil Procedure denying Dean Rohan's: (a) "property" in his Deanship, despite his testimony on, *inter alia*, his agreement with the St. John's University President securing the Deanship, and (b) "property" or "liberty" in his reputation coupled with professional positions?

10. Whether this Court should exercise its supervisory authority because the Second Circuit and District Court demonstrated a failure of judicial independence by ignoring much of the record and mistreating Dean Rohan's denial of due process case against the ABA as a matter of mere disparagement or some incidental allegations, rather than the proven denials of due process committed in violation of the ABA's own Rules of Procedure and Council Policies, involving biased fact-finding, denial of opportunity to comment, reliance on anonymous statements and breach of confidentiality in a confidential process?

11. Whether causation in a suit against a state actor brought under 42 U.S.C. § 1983 may be established when the reasonably foreseeable consequence of that state actor's unconstitutional conduct is the deprivation of "property" or "liberty"?

12. Whether this Court should exercise its supervisory authority because summary judgment could not properly be granted under Rule 56 of the Federal Rules of Civil Procedure on the fact-intensive inquiry of causation when the competent record evidence established that the reasonably foreseeable consequence of the denial of due process by the ABA was Dean Rohan's removal from the Deanship and Dean Rohan's suffering of "stigma-plus"?

13. Whether this Court should exercise its supervisory power in this case and reinstate Dean Rohan's alternative state constitutional and common law claims because: (a) the Second Circuit could not logically affirm the dismissal of those claims on the grounds used by the District Court as those grounds were from the District Court's federal law rulings not adopted by the Second Circuit and (b) the District Court failed to treat, as independent, the separate and "more flexible State involvement" test under the due process clause of the New York State Constitution (the text of which does not refer to state action) and failed to invoke the common law tradition to remedy the ABA's denial of due process in this case?

14. Whether this Court should exercise its supervisory power because under the circumstances of this case, the Second Circuit's use of a not-for-publication, not-for-citation "summary order" to tailor a result was such a manipulative affront to the rule of law as to constitute a denial of due process and equal protection of the law in violation of the Fifth Amendment to the United States Constitution?

15. Whether Justice Felix Frankfurter's classic statement on due process of law in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 149-74 (1951), is a dead letter?

PARTIES TO THE PROCEEDING

1. **Petitioner Dean Rohan.** The petitioner is Patrick J. Rohan ("Dean Rohan"), Professor of Law for 38 years and Dean for 10 years (1981 - 90) at St. John's University School of Law. The record shows Dean Rohan's lifetime of valuable service to and distinguished achievements in legal scholarship, legal education, the legal profession, government and society (A 118-21, 193-99):[1]

• Dean Rohan's degrees are: B.A., St. John's University (1954) (Cum Laude); LL.B., St. John's University School of Law (1956) (Magna Cum Laude); LL.M., Harvard Law School (1957); J.S.D., Columbia University (1965). (A 119, 193.)

• Dean Rohan has been a member of the Law Faculty of St. John's University Law School from January 1958 to date and has also been a Visiting Professor at Columbia University School of Law and New York University School of Law. From the Fall of 1980 to February 1, 1991, Dean Rohan was the Dean of the St. John's University School of Law (the fifth Dean in that Law School's 74-year history). His Deanship was defined by an express agreement with the St. John's University President (as informed by the historical practice at St. John's University) that the Law School Deanship was a position held until voluntary retirement or death, and thus, as explained by Dean Rohan in his testimony, was not an at will position. Effective February 1, 1991, St. John's University conferred upon Dean Rohan the title of "Dean Emeritus." Professor Rohan has taught law schools courses in, *inter alia*, personal and real property, trusts and estates, partnership, civil procedure, professional ethics, equity, constitutional law, land use planning and zoning, estate and gift taxation, advanced real estate and environmental law. (A 119, 193-94.)

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[1] The record citations will be either to the Petitioner's Appendix in this Court ("Pet. App. _) or, because of the size of the record below, the Record Appendix filed in the United States Court of Appeals for the Second Circuit ("A ").

• Dean Rohan has authored or co-authored legal treatises, including Rohan & Frankel, *Real Estate Syndications*; Rohan, Bobis & Goldstein, *Real Estate Brokerage*; Rohan, *Real Estate Tax Appeals*; Powell & Rohan, *Law of Real Estate (Desk Edition)*; and Rohan, *New York Estates Powers & Trusts Law (Desk Edition)*. He was responsible for the annual supplementation of fourteen treatises, including his own above-listed treatises and *Condominium Law & Practice* (with M. Reskin); *Powell on Real Property*; *Cooperative Housing: Law and Practice* (with M. Reskin); *New York Civil Practice - Estates, Powers and Trusts Law*; and *Zoning and Land Use Controls*. He was the editor or contributing author of numerous texts and monographs in various field of property law and is the author of over 25 published articles on subjects such as cooperative and condominium law, land use, legal ethics, legal education and gifts. (A 119-20, 194-96.)

• Dean Rohan was called upon to perform government studies and special assignments, including as: a consultant to the U.S. Department of Housing and Urban Development; a Member of the New York State Governor's Mitchell Lama Task Force; and a member of the New York Attorney General's Committee to evaluate regulations and procedures governing condominiums and cooperative offerings. (A 120, 197-98.)

• Dean Rohan's list of distinguished academic and professional positions and honors has included: elected Editor-in-Chief, St. John's Law Review; tied for first in his graduating law class with the Honorable Mario M. Cuomo, former Governor of the State of New York; appointed advisor to Restatement of Property, Second; elected to membership in the American Law Institute; elected to membership in the American College of Real Estate Lawyers; elected a Fellow of the American Bar Foundation; and selected in 1987 by the American Bar Association Legal Education Section to represent all law school faculties on the American Bar Association Membership Committee. (A 120-21, 197-98.)

Revealing how jaundiced the mistreatment of the record was by the Second Circuit and the District Court in this case, entirely missing from the Second Circuit's not-for-publication, not-for-citation "summary order" and from the District Court's unpublished opinion was any recognition of the foregoing facts concerning Dean Rohan -- facts associated with Dean Rohan's "property" and "liberty" interests. The non-recognition of Dean Rohan's career achievements by the Second Circuit and District Court was, however, consistent with the ABA's treatment of Dean Rohan (since 1990) as a non-person.

2. **The ABA Respondents**. The respondent ABA is an unincorporated association with its main offices at 750 North Lake Shore Drive, Chicago, Illinois 60611. The ABA, when inspecting and approving law schools for attorney licensing purposes, performs what the ABA Council Policies call a "quasi-judicial function" in the exercise of what New York Court of Appeals Judge Bellacosa and the ABA Accreditation Committee have identified as delegated authority from state judiciaries. (A 1043, 1048, 1217, 1220.) The respondent Claude R. Sowle is a Professor of Law at the University of Miami Law School and was the Chair of the ABA Site Inspection Team that visited St. John's University School of Law in March 1990, the principal author of the 1990 written ABA site inspection report on St. John's University School of Law, a member of the ABA Accreditation Committee that reviewed inspection reports on approximately 25 law schools in late October 1990 (including the report on St. John's University School of Law) and someone who has been witnessed (by a highly reputable member of the New York Bar), to have demonstrated a "personal envy and resentment" of Dean Rohan. (A 16-17, 54, 114.) The respondent James P. White has been the Consultant on Legal Education at the ABA and, as such, the administrator of the ABA's inspection and approval of law schools for attorney licensing purposes. (A 17, 79.) The other named respondents -- R. William Ide III, Barbara B. Lewis, Philip D. Shelton, George Steffan Grossman, and Bradley J.B. Toben -- were members of the ABA Site Inspection Team that visited St. John's University School of Law in

March 1990 and that was chaired by respondent Claude R. Sowle. (A 17, 159-60.)

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PETITION FOR A WRIT OF CERTIORARI

Dean Rohan requests a writ of certiorari to review the decision and judgment of the U.S. Court of Appeals for Second Circuit that -- by a not-for-publication, not-for-citation "summary order" tailored to reach a result, contrary to the record, unsupported by case precedent and seemingly structured to avoid review by this Court -- affirmed what had been shown on the record and the law to have been the District Court's indefensible grant of summary judgment. Constitutional questions important to the rule of law and to legal education are presented by Dean Rohan's case: the denial of procedural due process by the ABA performing what its Council Policies call a "quasi-judicial function" in the exercise of what New York Court of Appeals Judge Joseph Bellacosa and the ABA Accreditation Committee have identified as delegated authority from state judiciaries to inspect and approve law schools under state law for licensing of attorneys (*i.e.*, "officers of the court"); by that denial of due process, Dean Rohan -- a person expressly treated as "adversely mentioned" by the ABA in its inspection of St. John's Law School -- was deprived of his property and liberty interests, including the loss of a Law School Deanship and injury to reputation coupled with the loss of professional positions ("stigma-plus"). Because there was a failure of judicial independence favoring the ABA (which publicly extols its role in the selection of federal judges), this Court needs to exercise its supervisory authority so that the ABA does not wield power without due process accountability in the inspection and approval of law schools for Bar admissions.

OPINIONS BELOW

The not-for-publication, not-for-citation "summary order" of the panel of the Second Circuit is reproduced in Appendix A (A 1-A 5). The unpublished opinion of the District Court is reproduced in Appendix B (A 6-A 25).

JURISDICTION

After entry of the Second Circuit's not-for-publication, not-for-citation "summary order" on February 27, 1996, Dean Rohan filed a timely petition for rehearing with a suggestion for rehearing in banc. On May 14, 1996, that petition for

rehearing was summarily denied by an order which is reproduced in Appendix C (A 26-A 27). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Found at Appendix D are the relevant portions of the constitutional, statutory and regulatory provisions involved.

STATEMENT OF THE CASE

1. **ABA's Delegated State Authority To Inspect And Approve Law Schools For State Judiciaries**. The ABA supervises the quality of law school education *not* because it is an organization of lawyers with expertise, but because of the "delegation" of state authority from state judiciaries to approve law schools for Bar admissions (*infra*, p. 16). After a law school is accredited by the ABA, continuation of that ABA approval requires a determination by the ABA that a school continues to comply with ABA stated requirements of a basic legal education. That determination is made based upon: (a) a Self-Study by the school of its educational program and the goals of the Law School; (b) review by the ABA Accreditation Committee based on a site inspection; and as a matter of formality, (c) approval by the Council of the ABA Section of Legal Education and Admissions to the Bar and ultimately by the House of Delegates to the ABA. (Pet. App. A 56-A 58; A 143-44, 1020-21, 1125-26.) The ABA has written Standards for Approval of Law Schools ("Standards") and written Rules of Procedure for Approval of Law Schools ("Rules of Procedure"). (Pet. App. A 57-A 58; A 144-45, 1012-24, 1032-35, 1041.) The original versions were adopted "following review and comment by the chief appellate judge for each state, bar examiners in all jurisdictions, the deans of all ABA-approved law schools, and members of the [Legal Education] Section." (A 1212.) The Rules of Procedure particularly relevant here are: *Rule 26*, which governs the periodic evaluation of fully approved law schools and requires, *inter alia*, that the ABA "site evaluation" team be composed of qualified and "objective" persons and that the site evaluation team consult with the law school dean during the site

evaluation; *Rule 34*, which governs the handling of complaints concerning approved law schools so that complaints which allege facts indicating non-compliance with ABA Standards may be addressed by the law school's administration; and *Rule 36*, which restricts access to site evaluation reports and ABA Accreditation Committee and Council action reports so as to preserve confidentiality. (Pet. App. A 28-A 31, A 57-A 59; A 1020-24, 1041-42.) The ABA also has Policies of the Council of the Section of Legal Education and Admissions to the Bar and of the Accreditation Committee ("Council Policies"). (Pet. App. A 59; A 1025-45.) Council Policy Number 3 recognizes that "[t]hose who have significant responsibility in the process leading to accreditation of law schools serve a vital and quasi-judicial function in the legal system of the United States" and that "[i]t is important to the fair and effective functioning of the system of law school accreditation and to the maintenance of public and professional respect for that system that those who act in it act impartially and avoid even the appearance of impropriety." Council Policy 12 provides for the maintenance of confidentiality, while giving an individual who is subject to criticism an opportunity to reply. (Pet. App. A 31-A 32, A 59; A 1029-31, 1043-45.)

2. **Dean Rohan's Deanship**. In 1981, Dean Rohan became the fifth Dean of the St. John's Law School in the 74-year history of the school. In the context of a past tradition and practice that the Dean would continue until he retired of his own free choice or died, Dean Rohan met with the University President before accepting the Deanship to define the agreement on the nature and content of that position. The University President agreed Dean Rohan would run the Law School with no University interference and that the post would be Dean Rohan's until Dean Rohan retired. In 1983, the ABA conducted a site evaluation of St. John's Law School. The 1983 ABA site inspection team -- headed by Professor Richard Huber, then the Dean of the Boston College Law School and more recently, the President of the Association of American Law Schools -- praised the progress of the Law School

during the tenure of Dean Rohan as Dean. (Pet. App. A 45-A 46; A 123-24, 146-47, 295, 1049, 1054, 1074-76.)

Prior to the 1990 ABA site evaluation, Dean Rohan's position as Dean was quite secure, as his leadership of the Law School continuously enhanced the reputation and the quality of the education offered by the Law School by, among other things, (a) recruiting large numbers of minority and women faculty members; (b) increasing the admission and retention of disadvantaged students and originating the nationally recognized United Negro College Fund Scholarship Law School Program; (c) recruiting outstanding scholars, practitioners and members of the judiciary to provide St. John's University School of Law with a diverse and talented faculty (three former law school deans are on the faculty); (d) increasing the number of faculty so as to reduce the faculty-student ratio from 45:1 down to 26:1, the ratio called for in the ABA Standards; (e) establishing tutorials so as to aid all students (including minorities) in improving their performance in law school; (f) expanding the law school curriculum that offered a wide variety in law school elective courses; (g) having graduating classes every year which had a higher percentage of students passing the New York State Bar examination than any other law school in the country; (h) raising more money in financial support of St. John's School of Law than any other Dean in its history; and (i) putting in place plans for doubling the law school's physical facilities. During Dean Rohan's tenure, no student was suspended or expelled for disciplinary reasons, and no student left with a record that would give difficulty with the Bar Character Committee. In 1990, the student newspaper ran a poll showing that the vast majority of students were satisfied with the quality of their legal education and with the Law School administration, and that poll was included in the Law School's 1990 Self-Study to the ABA. (Pet. App. A 47; A 125-27, 148, 295-325, 505-06, 542.)

3. **The 1990 ABA Site Evaluation Inspection At St. John's Law School**. At the St. John's Law School, prior to the 1990 ABA site evaluation, a group of dissident faculty members emerged; they wanted larger salaries and control of

the personnel and budget committee at the law school and set out "to get" Dean Rohan by, *inter alia*, sending various communications, some anonymous, to the ABA in anticipation of the 1990 ABA site evaluation. Sowle, the Chair of the 1990 ABA site inspection team for St. John's, maintained a line of communication with those dissident faculty members and received anonymous documents critical of Dean Rohan, but did not afford him an opportunity to reply. (A 128-30, 156-58, 149-53, 543, 719, 742-53, 918-22.)

One of the anonymous documents critical of Dean Rohan -- entitled "The Law School At St. John's: A Statement of Some Faculty Concerns" -- was written by some of the dissidents (hereinafter, the "anonymous dissident memorandum"). When Sowle received it weeks in advance of the inspection, he discussed it with the dissidents, but did not tell Dean Rohan about it, much less seek his comments. When on the eve of the inspection Dean Rohan finally received a copy of the anonymous dissident memorandum from ABA Legal Education Consultant White, Dean Rohan immediately contacted White to obtain the right, which was granted, to submit a response. Dean Rohan believed the anonymous dissident memorandum to be wrong on the issues it purported to address. But at the site evaluation, Sowle, upon behalf of the ABA site inspection team, told Dean Rohan *not* to respond to the anonymous dissident memorandum, citing the need for "harmony." (A 158-61, 547-47, 550-51, 559.)

At the first substantive meeting of the site inspection on the morning of March 29, 1990, Sowle attacked the law school's Self-Study and falsely complained he had not known about faculty dissension. Dean Rohan defended the Self-Study as fully satisfying ABA requirements; and to Dean Rohan's and Vice Dean Fagan's knowledge, the Self-Study was no less satisfactory than others accepted by the ABA. Sowle cut the meeting short, commenting that Dean Rohan probably thought that he (Sowle) was "out to get" Rohan. Thereafter during the multi-day inspection of St. John's, the Sowle team did *not* meet with the Law School Administration, and particularly did *not* meet with Dean Rohan in his capacity as Dean. The site team did have a meeting with students, but

when a Student Bar Association representative spoke in favor of Dean Rohan and his administration, Sowle allowed her to be shouted down, thereby not allowing her to report the support that Dean Rohan had among the larger body of students. The ABA site team also had an evening reception with alumni, who praised Dean Rohan, reflecting the Dean's support among alumni. On March 31, 1990, the Sowle-led team met for three hours with University President Harrington and other top officials. Sowle, having admonished Dean Rohan not to respond to the anonymous dissident memorandum, used it to comment on Dean Rohan. The University President stated that he was determined to take whatever steps were necessary to remedy the deficiencies at the law school. (A 161-66, 377, 505-06, 549-50, 568-75, 754.)

4. **The Removal Of Dean Rohan As Dean As A Foreseeable Consequence Of The 1990 ABA Site Inspection of St. John's Law School**. Just prior to the ABA site inspection, St. John's University had had a number of accreditation issues arise with its other graduate schools, and senior University officials were especially sensitive to any possible question about the continued accreditation of the Law School. After the ABA inspection, as rumors spread around the Law School that the Law School was in danger of losing its accreditation, further phone communications occurred between the relatively new University President and White. Then, on Friday, April 13, 1990, Dean Rohan received a telephone call informing him that he was to be put on immediate "leave" and that he was to report to the office of University Vice President Barbara Morris on Monday, April 16, 1990. Dean Rohan retained Boris Kostelanetz, Esq., and they appeared in the office of Barbara Morris as scheduled. Dean Rohan was told he was to go on immediate "leave"; the understanding received from the St. John's University administration by Boris Kostelanetz and Dean Rohan was that this was due to the ABA inspection. (A 166-70, 507-08, 531, 783.)

The same day that Dean Rohan was being put on "leave," Sowle was revealing his bias against Dean Rohan to Edward S. Schlesinger, a 1957 graduate of Harvard Law School and member of the New York Bar. Schlesinger had what he

believed to be "a longstanding, cordial relationship" since 1983 with Claude Sowle, whereas he had only met Dean Rohan in 1989 when he joined Professor Casner's staff of Advisers on the Second Restatement of Property. On April 16, 1990, Schlesinger "ran into Claude Sowle in the hallway outside of his office at the University of Miami Law School." In the ensuing conversation, Sowle, "speaking in an acerbic tone of voice," commented that Dean Rohan, has a "very beautiful" house "in Westchester," "makes a lot of money on his lousy books" and "gets $25,000 for a two or three page opinion." Schlesinger was "completely taken aback by Claude Sowle's behavior because he was making personal comments of such an unprofessional nature" "suggesting a personal envy and resentment of Professor Rohan." (Pet. App. A 61; A 526-38.)

The next day, April 17, 1990, the University President issued a letter to Dean Rohan stating the formal terms of the "leave" and publicly announced that Vice Dean Fagan had been appointed as Acting Dean. On April 23, 1990, the *New York Law Journal* announced "St. John's Dean Takes Leave Abruptly." After reporting, in the first sentence, that Dean Rohan "began an unexpected 17-month sabbatical last week," the article continued, in the second sentence, to state: "The leave began after an inconclusive visit by the American Bar Association late last month." Consequently, rumors continued that the St. John's Law School was in danger of losing its ABA accreditation and that Dean Rohan was thus being suspended and would later be forced out as Dean. On April 24, 1990, White issued a press release announcing that St. John's Law School was a fully approved law school. This press release, however, was issued only after Dean Rohan had been put on "leave"; and on April 27, 1990, White wrote a memo to the file, but later submitted to the ABA Accreditation Committee, impugning Dean Rohan's mental stability and stating the that terms of Dean Rohan's leave included the term -- not yet known to Dean Rohan -- that Dean Rohan would resign. (Pet. App. A 61-A 62; A 162-63, 169-71, 366-68, 501, 548-50, 568-81, 754-57, 783-84.)

In the weeks that followed Dean Rohan's forced leave, the University pressed for his resignation consistent with White's

April 27, 1990 memo. University Counsel's letter to Boris Kostelanetz (Dean Rohan's lawyer) stated: "I think you will agree it would be in Pat's best interest if he were to resign rather than have the University announce his termination as Dean." The University prepared letters of resignation for Dean Rohan. Dean Rohan, rather than have a dispute develop over his termination with the University which he had served for over thirty years, "resigned" in August 1990 against his will and desire to see various projects, including the new law school building, to fruition. In the agreement between Dean Rohan and St. John's University, however, a specific paragraph was included to preserve Dean Rohan's right to take action with respect to the ABA the 1990 inspection of St. John's Law School. (Pet. App. A 62-A 64; A 171-72, 508-17, 758-63, 1298.) In the words of Dean Rohan: "both the specific contents and the overall tenor of the agreement clearly demonstrate: (a) that my 'retirement' or 'termination' or 'resignation' was anything but freely chosen; and (b) that the University, my then counsel (Boris Kostelanetz, Esq.) and I viewed the ABA defendants as the responsible parties for engineering my removal as Dean." (A 1302-03.)

5. **The ABA Site Inspection Team Report (the "Sowle Report"); Responses To The Sowle Report; ABA Accreditation Committee Action**. The ABA site evaluation written report (the "Sowle Report") was prepared by Sowle and was sent in September 1990 to St. John's Law School. It relied on the anonymous dissident memorandum and reflected both the failure of the ABA site inspection team to observe the ABA's Rules of Procedure and the bias of site inspection team Chair Sowle. (A 172-74, 369-480, 1006, 1211, 1264-69.)

Due to the content of the Sowle Report, Dean Rohan was provided a copy as a person "adversely mentioned". On September 14, 1990, Dean Rohan, after having reviewed the Sowle Report, wrote to White, stating that: (i) prior to the March 1990 site inspection of St. John's Law School, the ABA had received numerous anonymous communications, including the anoymous dissident memorandum, critical of Dean Rohan's administration; (ii) Dean Rohan and Vice Dean Fagan had been told not to respond to the anonymous

dissident memorandum; (iii) on the basis of the "exit interview" conducted by Sowle with the University President, the University decided to place Dean Rohan on an immediate 15-month "research leave"; (iv) the Sowle Report was based on the anonymous dissident memorandum to which Dean Rohan had been told not to respond; and (v) the Sowle report was inaccurate. White responded by letter, treating Dean Rohan as an "adversely mentioned person" under ABA Council Policies. Meanwhile, Acting Dean Fagan submitted his own letter criticizing the Sowle Report, and the St. John's University President wrote to record comments made at the exit interview in March about the misuse of the inspection process. (A 172, 178-81, 369, 510, 551, 560-67, 721-27, 774-79.)

In a letter dated September 30, 1990, to the ABA, Dean Rohan stated:

> In my capacity as a person adversely mentioned in an ABA Inspection Report, I am enclosing my Reply Papers. As these papers make clear, we believe that the recently completed ABA Inspection was rendered a nullity by *demonstrated bias* on the part of the head of the Team, Sowle, and by *a complete denial of due process*. Further, the three-hour, one-sided exit interview with our new President, Father Harrington, led directly to my being shipped out on a fifteen month leave of absence, commencing on April 17, 1990....The foregoing events have caused tremendous harm to myself.... [T]he site visit was a nullity because: (a) The Team Chairman was not impartial; (b) The Team, by their own admission, did not do a normal, broad-based investigation of the facts; and (c) There was a total lack of due process....

(A 180-81, 863-64; emphasis in original.) Dean Rohan's papers argued that the ABA site team had made a sham of due process by admonishing Dean Rohan not to reply to the anonymous dissident memorandum and then relying upon it during the "exit interview" with the University's administration and in the Sowle Report itself. (A 181-82, 865-917.)

White sent a letter to Dean Rohan asking that he bracket the portions of the Sowle Report that were unacceptable. In response, Dean Rohan sent a letter to White: (i) that "bracketing" the Sowle report was unworkable; (ii) that the Sowle Report should be set aside in its entirety because of the denial of due process -- the site inspection team Chair had been biased, Dean Rohan had been directed by the site team not to respond to the anonymous dissident memorandum that "formed the crux" of the site team's fact-finding, and the site team had failed to consult with the Law School's administration on the Law School's operations; and (iii) that as a direct consequence of the ABA site team's exit interview, Dean Rohan had been removed from the Deanship. The ABA Accreditation Committee, when reviewing the findings of the Sowle inspection in late October 1990, did not have Dean Rohan's submission of October 18, 1990, and did not otherwise afford Dean Rohan an opportunity to be heard under the circumstances. The ABA Accreditation Committee went on to accept the Sowle Report, with its reliance on the anonymous dissident memorandum. (A 182-90, 512, 728-39, 741, 765-73.)

6. **The Appointment of An ABA Accreditation Committee Member To The Deanship At St. John's; The ABA's Failure to Preserve Confidentiality Under The ABA's Rules and Policies; Dean Rohan's Damages; This Lawsuit**. In early April 1991, Rudolph Hasl was announced to be new Dean for St. John's Law School starting the 1991-92 school year. Hasl had been a member of ABA Accreditation Committee that included Sowle and that reviewed St. John's Law School in late October 1990 in Puerto Rico. On April 19, 1991, *The New York Times* published an article entitled "Reeling From Unrest, St. John's Awaits New Law Dean." *The New York Times* article purported to report on the situation at St. John's Law School and included not only the accusations of dissident faculty members critical of Dean Rohan, but also confidential information from the Sowle Report and comments from the ABA site inspection team. Following the article in *The New York Times*, no action was taken by the ABA to determine whether ABA Rules and Policies preserving confidentiality had been breached by ABA

representatives. Meanwhile, on April 29, 1991, St. John's University President Harrington wrote to White about "the important subject of identifying and appointing a new dean for St. John's University School of Law" in an effort to persuade White that St. John's Law School was in compliance with ABA Standards. At the same time, Dean Rohan was undergoing serious financial consequences from the loss of salary and pension contributions, the loss of director fees, the loss of consultancy income and the loss of royalties. (A 189-92, 482-503, 539-40, 765, 983-85.)

Dean Rohan commenced this action with a detailed, well-pleaded Complaint, alleging claims under 42 U.S.C. § 1983 and under state constitutional and common law. (A 11-74.) The ABA defendants did not move to dismiss but rather answered. (A 586.) After initial document production but prior to the taking of depositions (A 586-88), the ABA defendants moved for summary judgment. Based on a selective, error-ridden and incomplete statement of facts, the District Court granted summary judgment (Pet. App. A 6-A 25), and the Second Circuit affirmed in a not-for-publication, not-for-citation "summary order" (Pet. App. A 1-A 5). On May 14, 1996, the Second Circuit summarily denied Dean Rohan's timely petition for rehearing and suggestion for rehearing *in banc*. (Pet. App. A 26-A 27.)

REASON FOR GRANTING THE WRIT

Pursuant to Rule 10(a) and (c) of the United States Supreme Court Rules, this Court should grant the writ of *certiorari*. An independent federal judiciary is an essential feature of American government, fundamental to the implementation of the rule of law and to the protection of individual rights. In the hands of the federal judiciary have been the great ideals of the American nation -- liberty under law, a government of laws and not men, and equal justice for all -- because we have put before our federal courts constitutional and statutory questions of all kinds. Accordingly, the independence of the judiciary is a right of a free people that imposes an obligation on judges to be scrupulously honest and impartial, to base their decisions on the merits, upon the evidence before them

and the applicable law, and not to implement a political agenda that would substitute political will for the rule of law. Of course, federal courts, having an obligation to be independent in all cases, must be independent in cases involving politically influential parties such as the ABA, particularly given the ABA's critical role in the selection of federal judges -- a role that the ABA zealously defends.[2] Here, as the following points will show, this Court's supervisory authority needs to be exercised to correct the failure of judicial independence in a Law School Dean's case that involves both a gross abuse of summary judgment and important federal constitutional questions that this Court should decide.

1. **The Second Circuit's Not-For-Publication, Not-For-Citation "Summary Order" Was Premised On A Misstatement Of Dean Rohan's Denial Of Due Process Case And An Abuse Of Summary Judgment**. The words "due process" nowhere appeared in the Second Circuit's opinion in describing Dean Rohan's case. Rather, the not-for-publication, not-for-citation "summary order" broadly and inaccurately stated:

> The conduct of which Rohan complains is essentially incidental to the accreditation process and the nexus between that process and state bar admissions. In substance, Rohan complains that defendants-appellees so disparaged him to the administration of St. John's University that, as a direct consequence, he was compelled first to take an abrupt research leave from, and ultimately to resign, the deanship.

(Pet. App. A 3.) As will be discussed below (*infra*, pp. 20-21), the Second Circuit's arbitrary labelling of the ABA site inspection team's activities at St. John's Law School as

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[2] R. Stein, "For The Benefit Of The Nation," *ABA Journal*, p. 104 (March 1996); "Today's News," *New York Law Journal*, p.1. col.1 (May 22, 1996) (ABA President defends role of ABA in selection of federal judges); N. Lewis, "Senators Question Bar Association's Role In Selecting Judges," *New York Times*, p.A.14 (May 22, 1996).

"incidental to the accreditation process" is absurdly contrary to the record facts concerning the ABA inspection and approval process and flies in the face of summary judgment law; but just as bad, the Second Circuit's reduction of Dean Rohan's case to one of disparagement was flat wrong. Dean Rohan's Complaint, Dean Rohan's testimony, Dean Rohan's briefs to the Second Circuit all made it clear that his case is the denial of due process by the ABA about which he formally complained to the ABA in 1990. (Complaint at Pet. App. A 33-A 38; Rohan Aff. at Pet. App. A 43-A 44; Main Brief at pp. 5, 19-22, 49-51; Reply Brief at pp. 2, 19; Rehearing Petition at pp. 2.) There was *no* basis for the Second Circuit to re-write Dean Rohan's due process case. That kind of re-writing is what some slick attorneys in private practice might do try to do to avoid the merits of a sound case well pleaded and amply proven, but the Second Circuit had no legal basis for doing so and no non-politicized court would have done so.

Dean Rohan's pleaded cause of action for *denial of due process* under 42 U.S.C. § 1983 defined the ABA's specific due process obligations and alleged that the ABA defendants denied procedural due process to Dean Rohan by, among other things, "not giving him an effective opportunity to be heard before the ABA Site Evaluation Team reported severely negative criticisms of Professor Rohan to the administration of St. John's University"; "using the 'Anonymous Dissident Document' as a substitute Self-Study without any consideration of law school administration views"; "violating Rule 26 of the ABA Rules of Procedure and Council Policy Statement Number 3 [requiring objective site evaluation teams]"; "violating Rule 34 of the ABA Rules of Procedure [requiring certain treatment of anonymous communications]"; "under the circumstances presented herein, not providing a hearing involving an individual appearance to Professor Rohan before the ABA Accreditation Committee"; and "violating Rule 36 of the ABA Rules of Procedure [requiring confidentiality]." (Pet. App. A 35-A 37.) In this case, the core due process concerns were (i) the provision of a meaningful opportunity to comment and (ii) the requirement of an impartial fact-finder; and Dean

Rohan brought this action to bring needed due process constraints to the ABA's inspection and approval of law schools for attorney licensing purposes (Pet. App. A 43-A 44). Dean Rohan's pleaded case -- which the ABA did not challenge and the Second Circuit did not address -- was squarely based on Justice Frankfurter's classic exposition of due process in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 at 149 - 74 (1951), Justice Powell's discussion of administrative due process in *Matthews v. Eldridge*, 424 U.S. 319, 334 - 35 (1976), and Judge Friendly's influential due process article, "Some Kind of Hearing," 123 U. Pa. L.Rev. 1267 (1975).

This is the denial of due process case proven by Dean Rohan in the summary judgment record with the affidavits of Dean Rohan (A 115-503), Boris Kostelanetz (A 504-25), Edward Schlesinger (A 526-38), Vice Dean Fagan (A 539-67), Lisa Healy (A 568-75) and Michael Inzelbuch (A 576-84) and with properly introduced ABA documents (A 585-1232). Neither the District Court in its unpublished opinion nor the ABA in its argument to the Second Circuit dealt with that record. Instead, the District Court and the ABA relied upon a selective, superficial and disputed statement of facts that could not be the basis for an independent judicial decision because it would violate basic principles of summary judgment law. Rule 56, F.R. Civ.P.; *Celetex Corp. v. Catrett*, 477 U.S. 317 (1986). Similarly, the Second Circuit's not-for-publication, not-for-citation "summary order" did not state the facts and did not address much of the record; and what the Second Circuit did summarily address, while reflecting some negative criticisms of Dean Rohan passed on to the St. John's University administration by the ABA site team inspection during the formally scheduled "exit interview," omitted the record facts showing that those criticisms were the result of: (i) a biased Chair of the ABA site inspection team (Sowle) who maintained a line of communication with dissident faculty out "to get" Dean Rohan and who told Dean Rohan not to respond to the anonymous dissident memorandum critical of Dean Rohan (criticisms of which were then reported to the University administration at the exit interview and relied upon in the ABA site inspection team's written report); and (ii) the

failure to give Dean Rohan at any point during the site inspection an opportunity to comment on the matters at the Law School being evaluated by Sowle and the site inspection team.

The Second Circuit's misstatement of Dean Rohan's due process case and mistreatment of the record was key to the Second Circuit's erroneous rulings on the critical issues of state action, causation and "liberty." Furthermore, serious attention by the courts and the legal profession is merited by a case that shows the kind of denial of due process by the ABA as in this case. The Second Circuit's politicized failure to address Dean Rohan's due process case as pleaded and proven calls for this Court's supervisory authority to correct.

2. **The Record Establishes That The ABA Exercises Delegated State Authority From State Judiciaries To Inspect And Approve Law Schools For Licensing Of Attorneys ("Officers of the Court").** The Second Circuit's statement that it did "not reach the issue whether the ABA is generally a state actor in connection with law school accreditation activities" (Pet. App. A 3) was an inappropriately convenient treatment for the ABA, which has sought to avoid due process responsibilities, in the face of the record establishing, under "delegation" and "public function" state action case law, that the ABA exercises delegated state authority from state judiciaries to inspect and approve law schools for attorney licensing (and from the Department of Education for federal funding purposes). *See West v. Atkins*, 487 U.S. 42 (1988)(delegation to private physician of state prison medical responsibilities); *Horton v. Flenory*, 889 F.2d 454 (3d Cir. 1985)(delegation, by unwritten policy of deferral to private club owners, of State criminal investigatory authority); *Milo v. Cushing Municipal Hospital*, 861 F.2d 1194 (10th Cir. 1988)(public authority's delegation to private entity of day-to-day mangement of hospital); *Medina v. O'Neill*, 589 F.Supp. 1028 (S.D. Tex. 1984)(state authority delgated by action of INS official to private security firm to detain aliens); *Rouse v. Judges of Circuit Court of Cook County*, 609 F.Supp. 243(N.D. Ill. 1985)(City Bar Association engaged in public function in evaluation of judicial candidates where "not recommended" finding tantament to exclusion); *Greenberg v.*

Ashland County, 590 F.Supp. 1005 (N.D. Wisc. 1984)(private agency asserting and treating drivers under threat of losing licenses engaged in public function); *Terry v. Adams*, 345 U.S. (1953)(private political association's election state action because provided choice of public officials). Citing the "delegation" and "public function" state action case law, *Oral Roberts v. American Bar Association*, No. 81-C-3171 (N.D. Ill. 1981), ruled that the ABA, in its inspection and approval of law schools for state judiciaries, is engaged in state action (A 1284, 1286-87); and the ABA's own documents recognize that, and explain why, the ABA exercises delegated state authority, performing a public function in which state judiciaries are significantly involved.

The 1983 Report of The ABA Accreditation Committee to the Committee on Recognition, Council on Post-Secondary Accreditation (known as "COPA") -- made with an observer from the U.S. Department of Education present -- stated that:

> Constitutional licensing authority for lawyers rests with the judiciary, because under the American system of separation of powers, the power to control lawyers lies with judges, not with legislators, executives, or administrative agencies. In most states, the courts do not engage in a detailed process of deciding which law schools are adequate, but rely upon the accreditation activities of the American Bar Association. It is because of this *delegation*, not because the Association is an organization of lawyers, or because its members are lawyers, that the American Bar Association is allowed to approve and accredit law schools.

(A 1048; emphasis added.) Accordingly, the ABA's Council Policies acknowledge its "quasi-judicial function" in the inspection and approval process. (Pet. App. A 31; A 1220.)

New York Court of Appeals Judge Joseph W. Bellacosa, who was a member of the ABA Accreditation Committee since October 1987 and until 1995 the Committee's Vice Chairperson, also explained the "delegation" of authority in his article entitled "A Judicial Perspective of the Process,"

published in the Winter 1990 edition of *Syllabus* (A 1217), a publication of the ABA Section of Legal Education (A 1225). Based on his contacts with the ABA Consultant on Legal Education (defendant White), the Chairperson of the Accreditation Committee (Minnesota Supreme Court Justice Rosalie Wahl), and a fellow Committee member (Michigan Supreme Court Justice Dennis Archer), Judge Bellacosa wrote:

> *As a judge of my state's highest court*, I especially appreciate the indispensable service delivered by a process sustaining threshold qualifications for law school graduates seeking primary admission to practice. *Without certification that law schools are approved through the ABA (as recognized by the U.S. Department of Education), the fifty highest state courts would have to fend for themselves and fund a governmental auxiliary to perform that task.* Such parochial balkanization would be regressive to legal education and the profession.
>
> *The states' highest courts* rely on this process under an unwritten, implied *delegation*. Thus, they need assurance that it is fair, diverse in representation, imbued with *due process* and equal protection, and operated with mutuality of respect...

(A 1217; emphasis added.) Judge Bellacosa continued in his article by reporting a telling exchange with then New York Governor Mario Cuomo, who "tested" Judge Bellacosa with these questions: "Who gave the Accreditation Committee this power? Why should you give it your time? Can your court docket afford the diverted time?"

(A 1220.) Judge Bellacosa answered:

> *"The power is revocably delegated to the ABA by the states' highest courts* based on an excellent track record and a felt need for a unifying entity to apply national standards. Besides, *if they didn't do it, we'd have to pay for a separate New York process out of the state budget!"*

(A 1220; emphasis added.)

In this case arising in New York, no more persuasive authority exists than a New York Court of Appeals judge, who is well versed in ABA accreditation responsibilities, to explain the "delegation" of state authority to the ABA. Yet, the Second Court purported not to reach an issue of such importance to legal education; and the District Court (i) did not disclose the factual record that fully supported the above-quoted statement of Judge Bellacosa and the official statements of the ABA and (ii) without identifying those statements, ruled them to be "not germane," thereby effectively ruling -- absurdly -- that there was an absence of a triable issue that the statements of Judge Bellacosa, the ABA Accreditation Committee and the ABA Council Policies were false.

Complimenting in this case the express ABA statements recognizing the delegation of state authority is a record supporting a "Brandeis Brief" establishing that the ABA makes non-reviewed determinations of what is "approved legal education" under state law for attorney licensing by state judiciaries and performs a public function with significant state judicial involvement. (*See* Pet. App. A 48-A 59.) The District Court's misconceived rationalizations for not finding state action could not withstand scrutiny under the record in this case or sound legal analysis. (*See* Pet. App. A 52-A 53.) But the District Court's error went farther. The District Court ignored the precedent shown to it of *Oral Roberts v. American Bar Association*, which found "state action" by the ABA in this context, while citing *Zavaletta v. ABA*, No. 89-326-N (E.D.Va. 1989), as if it were a considered opinion on the subject when in fact -- as the District Court was shown (A 596-98, 1288-89) -- *Zavaletta* involved brief unpublished bench comments that were made without the benefit of briefing, that were dicta (the court found no denial of due process), and that relied upon an *ipse dixit* application of *Tarkanian v. NCAA*, 488 U.S. 179 (1985), even though the District Court found *Tarkanian* distinguishable and even though the differences between *Tarkanian* and this case -- different activities (college basketball versus licensing of lawyers) and different state action theories (joint participation versus delegation/public function) -- support a finding of state action here.

As a result of the flawed treatment of the "state action" issue by the District Court, the ABA presented to the Second Circuit a series of unacceptable legalistic arguments: (i) that ignored the concerns in state action doctrine for the misuse of power, *United States v. Classic*, 313 U.S. 299, 325 (1941), and misapplied a concern for individual freedom (as if that were appropriate for a "quasi-judicial function"); and (ii) that relied upon cases involving nursing homes, college basketball and private medical boards which flew in the face of the point that "state action" issue is a "necessarily fact-bound inquiry," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982), *quoting Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), and were clearly inapposite to the ABA's delegated state authority to approve legal education for Bar admissions. The Second Circuit purported not to reach the "state action" issue because, to do so, would have meant finding "state action" by the ABA. This Court should properly decide the "state action" issue.

3. **The Second Circuit's Not-For-Publication, Not-For-Citation "Summary Order" On The "State Action" Question Under 42 U.S.C. § 1983 Was Contrary To "State Action" And Summary Judgment Law** The Second Circuit, to avoid holding that the ABA is engaged in state action in the inspection and approval of law schools for attorney licensing purposes, thus issued a not-for-publication, not-for-citation "summary order" in which it was asserted that: (a) the ABA defendants "could not arguably be considered state actors" "unless they made comments to the university administration at their exit interview which linked Rohan's removal from the deanship to a successful accreditation of the law school" and (b) "Rohan has not established a triable issue of fact that this occurred." (Pet. App. A 3.) Neither proposition, however, could remotely be maintained; this Court should not let stand such an unprincipled decision on the state action issue.

(a) **The ABA Defendants Were State Actors Because They Were Actors In A "Quasi-Judicial Function" In The Process For Inspection And Approval Of Law Schools For Attorney Licensing Purposes**. The Second Circuit cited *no* precedent and *no* other legal authority for the

proposition that the ABA defendants could not be considered state actors unless they made comments to the university administration at the exit interview which linked Dean Rohan's removal from the Deanship to the successful accreditation of St. John's Law School. There was good reason for that omission: there is *no* case precedent and *no* other legal authority supporting the Second Circuit's assertion. It was a concoction to dress up an unjustifiable result.

The ABA did argue to the Second Circuit that a "nexus" was required between the state action alleged in this case and Dean Rohan's reputational and employment-related injuries. But the ABA's argument -- which confused the "state action" inquiry with the separate "causation" inquiry -- relied upon inapposite case law, not cited by the Second Circuit, that presupposed that the defendant institution was *not* engaged in state action. In *Tarkanian v. NCAA*, 488 U.S. 179 (1988), Coach Tarkanian sued not UNLV (a state university), but the NCAA (a private association), employing a joint participation theory of state action that the Supreme Court majority rejected because UNLV and the NCAA were in sharp adversarial conflict over, not jointly acting concerning, Coach Tarkanian. With the NCAA determined not to be a state actor, there was no "nexus" for Coach Tarkanian to ascribe causation to UNLV (the State) for the actions of the NCAA. In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), a private school receiving public funding could not be treated as a state actor because there was not a symbiotic relationship between the state and the school. With the school determined not to be a state actor, there was no "nexus" for the teachers in an employment dispute with the school to ascribe causation to the state. These cases would not and did not justify the Second Circuit declining to determine that the ABA is a state actor in the inspection and approval of law schools for attorney licensing purposes. If the ABA defendants are so determined to be state actors in this context, as they should be under the delegation and public function "state action" case law, then the ABA's "nexus" theory is meritless.

The Second Circuit's treatment of the ABA's site team activities not only lacked any supporting legal authority but was

also flatly contrary to the record -- a telling point because the "state action" issue is a "necessarily fact-bound inquiry" (*supra*, p. 19). ABA approval requires a determination that a law school continues to comply with ABA stated requirements of a basic legal education -- a determination based primarily on a Law School's Self-Study and review by the ABA Accreditation Committee based on a site inspection (*supra*, p. 2). The fact-finding by the ABA site inspection team is thus central to the accreditation process and the critical basis upon which the accreditation decision is made. Furthermore, as described above, the ABA inspection and approval process -- including the site inspection team's function -- is subject to Council Policies and Rules of Procedure (*supra*, pp. 2-3). Council Policy Number 3 recognizes that "[t]hose who have significant responsibility in the process leading to the accreditation of law schools serve a vital and quasi-judicial function in the legal system of the United States." (Pet. App. A 31.) Rule of Procedure 26 requires that the ABA site evaluation teams be composed of "objective" persons and consult with the Law School Dean concerning the site inspection, and Rule of Procedure 34 governs the handling of anonymous complaints. Hence, there was no basis in the record to treat as "incidental" a scheduled "exit interview" by the ABA site inspection team with University administration officials at the end of the site inspection about the ABA site inspection team's factual findings with respect to the operations of the law school. The ABA defendants were state actors because they functioned as the critical part of the ABA's process for inspecting and approving law schools -- what the ABA Council Policies call a "quasi-judicial function." (Pet. App. A 31, A 56-A 59.)

(b) **Dean Rohan Did Establish A Triable Issue Of Fact On Causation: The Removal of Dean Rohan From The St. John's Deanship Was Proximately Caused By The Denial Of Due Process Involved In The March 1990 ABA Site Inspection Of St. John's Law School.** The Second Circuit's abuse of summary judgment and mistreatment of the record to deny causation was flawed first because it was *not* necessary to establish that comments were made in the site

inspection exit interview that expressly linked successful accreditation and Dean Rohan's removal as Dean. A cited need for "harmony" between Law School faculty and administration coupled with the presentation of the Dean as, among other things, unresponsive, unapproachable and subject to cronyism would effectively communicate the same message. But more importantly, the Second Circuit's stated requirement stemmed, at best, from the misstatement of Dean Rohan's case as one of mere disparagement, instead of Dean Rohan's pleaded and proven due process case (*supra*, pp. 12-15). With the proper statement of Dean Rohan's due process case, the requisite causal link is established by the ABA's denials of due process in the site inspection and approval process that, as a foreseeable consequence, resulted in Dean Rohan's removal from the Deanship. *Singer v. Seamon*, 821 F.2d 871 (1st Cir. 1987); *Bowers v. Devito*, 686 F.2d 616 (7th Cir. 1992); *Chernin v. Lying*, 874 F.2d 501 (8th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978).

The Second Circuit's treatment of the record as to causation additionally did not accurately portray the evidence and was contrary to the rule governing summary judgment requiring that "all inferences drawn from the materials submitted to the trial court are viewed in a light most favorable to the party opposing the motion." *See, e.g., Addickes v. SH Kress & Co.*, 398 U.S. 144 (1970); *Oxley v. City of New York*, 923 F.2d 22, 24 (2d Cir. 1991).

The Second Circuit first noted: (i) Sowle's affidavit denying any express statement at the site inspection team's exit interview linking the accreditation of St. John's Law School and Dean Rohan's removal (the Second Circuit made no reference to Edward Schlesinger's affidavit documenting Sowle's bias); and (ii) University Vice-President Morris' notes of the exit interview reflecting that the ABA site inspection team did communicate the anonymous dissident memorandum's criticism of Dean Rohan. (Pet. App. A 3-A 4.) In this connection, the Second Circuit absurdly ignored that in the Sowle Report, the University President was reported at the exit interview as being determined to take whatever steps were necessary to cure the deficiencies that were

reported to him by the ABA inspection team, and that the first and most dramatic step was the removal of Dean Rohan as Dean -- an action that was duly reported in the ABA Sowle Report. (A 165-66, 363-65, 389-400, 1258.)

The Second Circuit then disparaged the testimony of Dean Rohan and Boris Kostelanetz as "essentially speculation" "that the university administration acted adversely to Dean Rohan in the aftermath of the exit interview because of a perceived threat of disaccreditation that his removal would alleviate." (Pet. App. A 4.) That, however, was not "speculation"; that was what happened according to the record evidence. Dean Rohan and Boris Kostelanetz testified on their meeting with the University administration when Dean Rohan was suddenly put on immediate involuntary leave following the ABA site inspection exit interview, amidst rumors that St. John's Law School was in danger of losing its accreditation. At that meeting, they received the understanding from University Vice-President Morris that the action against Dean Rohan was taken because of that ABA site inspection. Also, Dean Rohan's record as Dean was such that there was no other apparent reason than the ABA site inspection for the University administrative's action; on less information than is in this record, the press drew the connection between the ABA site inspection at St. John's (reported as having found an unsatisfactory situation) and Dean Rohan's effective removal from the Deanship. (Pet. App. A 59-A 62; A 125-27, 131, 148, 166-86, 505-13, 542.) Thus, what the Second Circuit called "speculation" was instead proper testimony and proper inferences required by the rules governing summary judgment to be drawn in favor of Dean Rohan based on all the materials in the summary judgment record (*supra*, p. 22). Depositions under Rule 56(f) of the Federal Rules of Civil Procedure were not necessary to defeat the ABA's summary judgment motion. But had there been any doubt about the sufficiency of the Rohan and Kostelanetz testimony and the documentary evidence (which there should not have been), the proper course would have been to order Rule 56(f) depositions -- a position preserved by Dean Rohan (A 587-88) -- and *not* to grant summary judgment on a ground that no one

would seriously entertain absent the power and the importance of the ABA.

The Second Circuit finally disparaged as "speculation" the evidence of telephone conversations between White (the head of the ABA Legal Education Section) and University President Harrington in the short period of time between the exit interview and the University's placement of Dean Rohan on immediate leave from the Deanship. (Pet. App. A 4.) But again, that evidence could not properly be dismissed as mere speculation. White's memo recording the fact of these conversations with University President Harrington impugned Dean Rohan's mental stability; and it was White who issued a press release to dispel rumors about the accreditation status of St. John's Law School, but only after the University President had put Dean Rohan on leave, with the understanding shared with White, but not with Dean Rohan, that Dean Rohan would not be allowed to return to the Deanship. (Pet. App. A 62; A 166-71, 783-84.) Furthermore, University President Harrington would later write to White about the appointment of a member of the ABA Accreditation Committee as the new Dean in an effort to persuade White that St. John's Law School was in compliance with ABA Standards. (A 983-84.) Thus again, what the Second Circuit called "speculation" was rather a proper inference required by the rules of governing summary judgment to be drawn in favor of Dean Rohan based on all the materials in the summary judgment record (*supra*, p. 22).

The Second Circuit thus badly erred on the subject of causation, a fact-based inquiry typically and in this case for the jury. This Court should exercise its supervisory power so that the ideal of equal justice under law is not mocked by slick mistreatment of record evidence to reach a result for the politically influential party.

4. The Second Circuit's Not-For-Publication, Not-For-Citation "Summary Order" On "Property" And "Liberty" Under 42 U.S.C. § 1983 Was Premised On Misstatements Of Dean Rohan's Case And Testimony And Thus Reached A Result Contrary To The Governing Law.

This Court should exercise its supervisory power to correct the lower courts' abuse of summary judgment on the important constitutional issues of "property" and "liberty."

(a) **Dean Rohan's Ten Year-Deanship Was A "Property" Interest**. The Second Circuit summarily ruled that based on Dean Rohan's testimony about "general assurances provided by then-President Cahill concerning the tenure of Rohan's deanship," the St. John's Law School Deanship was still an at will relationship not qualifying as a "property" interest. (Pet. App. A 4.) The Second Circuit's characterization of Dean Rohan's testimony was, however, inexcusably inaccurate, resulting in the erroneous legal conclusion. Dean Rohan testified that "[t]he St. John's University administration (particularly in the persons of Father Cahill and my immediate supervisor, Dr. Carl Robusto) and I regarded my position as Dean as an appointment until I died or freely chose to retire, not as an employment at will." (Pet. App. A 44-A 47; A 124.) Dean Rohan explained that he and St. John's University (in the person of the University President Cahill) reached an express agreement and understanding "on the nature and content" of the Deanship. (Pet. App. A 45; A 123.) The totality of the circumstances and agreements defining the Deanship were such that Dean Rohan's tenure as Dean of the St. John's Law School was "secure," because of: (a) the established tradition and practice relating to the St. John's Law School Deanship; (b) his express agreement with Father Cahill when he was appointed Dean in early 1981 on recommendation of the Dean Search Committee; (c) his status as a confidant and trusted advisor to President Cahill; (d) his contract with Dr. Morris furnished him with the "perks" of a Department Chairman in research assistants and a secretary for publication work; and (e) the qualitative enrichment of St. John's Law School during his tenure as Dean. (Pet. App. A 47-A 48; A 127.)

Based on this record, Dean Rohan did have "a legitimate claim of entitlement" securing his position, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); and the New York law of at will employment could not be properly applied for two reasons. *First*, there was an express limitation on the right of

termination supplied by Dean Rohan's express agreement with the University President -- an agreement that confirmed the traditional practice at St. John's Law School so as to satisfy New York law as stated in *Weiner v. McGraw Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982). *See Gorill v. Icelandia/Flugleida*, 762 F.2d 847, 852-53 (2d Cir. 1985) (*Weiner* not to be read restrictively). *Wright v. Cayan*, 817 F.2d 999 (2d Cir.), *cert. denied*, 489 U.S. 853 (1987), did not justify a contrary conclusion: Dean Rohan and President Cahill agreed to define the terms of a Law School Deanship in the context of an established practice and Dean Rohan's status at the University, not some lower level position in a business company. *Second*, the presumption of at will employment for employment of indefinite duration and no express limitation on termination is rebuttable (a subject not addressed by this Court in *Wright*); and independent of the limitation on termination consistent with *Weiner*, the totality of the agreements defining Dean Rohan's Deanship preclude placing it in the discretionary at will category. *See, e.g., Starishevsky v. Hofstra University*, 161 Misc. 2d 137, 612 N.Y.S.2d 794, 802-06 (Sup. Ct. Suffolk Cty. 1994).

To misapply New York at will employment law to this case, and thereby deny a federal constitutionally protected "property" interest in the Deanship, the Second Circuit's not-for-publication, not-for-citation "summary order" was in conflict with: (i) this Court's decision in *Connell v. Higginbotham*, 403 U.S. 207 (1971) (property established by implied promise of continued employment), and *Perry v. Sindermann*, 408 U.S. 593 (1972) (property established by informal practice in employment); (ii) other Circuit decisions in *Chernin v. Lyng*, 874 F.2d 501 (8th Cir. 1989) (Arnold, J.) (refusal to apply at will categorization to define "property") and *McLaurin v. Fischer*, 768 F.2d 98 (6th Cir. 1985)(property established by "mutually explicit understanding" or "unwritten common law practice in the work place"); and (iii) and the "purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives." *Board of Regents v. Roth, supra*, 408 U.S. at 577.

(b) **Dean Rohan Was Deprived Of His "Liberty" In Suffering "Stigma-Plus"**. The Second Circuit also conclusorily ruled that Dean Rohan did not adequately assert the deprivation of a "liberty" interest, which the Second Circuit stated required more than the loss of employment flowing from the effects of simple defamation, citing *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994). (Pet. App. A 5.) It was a wholly unsupportable ruling because in *Valmonte v. Bane*, the Second Circuit adhered to the "stigma-plus" test for a "liberty" interest following this Court's decision in *Siegert v. Gilley*, 500 U.S. 226 (1991), and because Dean Rohan clearly satisfied that "stigma-plus" test and Justice Frankfurter's "grievous loss" standard in *Joint Anti-Fascist Refugee Comm. v. McGrath*, *supra*, 341 U.S. at 168.

The error of the Second Circuit was that Dean Rohan did *not* assert he lost employment flowing from the effects from the effects of simple defamation. That mischaracterization stemmed from, yet again, the Second Circuit's misstatement of Dean Rohan's due process case as one of mere disparagement (*supra*, pp. 12-15). Quite differently, what Dean Rohan asserted and proved was that he: (i) was removed from the St. John's Deanship and lost income as a result of the ABA site inspection's lack of due process; (ii) suffered reputational injury in the public when removed from that Deanship in the wake of the flawed ABA site inspection; (iii) lost a directorship and a visiting professorship; and (iv) did not, as he had in the past, receive any fee-generating appointments. The foregoing is "stigma-plus" consistent with *Board of Regents v. Roth*, 405 U.S. 564 (1972), and *Roth* was reaffirmed by this Court in *Siegert v. Gilley*. The foregoing is also the kind of "grievous loss" that Justice Frankfurter saw could not be inflicted without due process. *Joint Anti-Fascist Refugee Comm. v. McGrath*, *supra*, 341 U.S. at 168. Furthermore, important due process precedents such as *Joint Anti-Fascist Refugee Committee* precluded the erroneous reading of *Paul v. Davis*, 424 U.S. 693 (1976), and *Siegert v. Gilley* urged by the ABA, and Dean Rohan's due process case did not raise the federalism concern of not federalizing the state law of defamation underlying *Paul v. Davis* and *Siegert v. Gilley*.

5. **The Second Circuit's Not-For-Publication, Not-For-Citation "Summary Order" Was Illogical And Unsupportable On The Dismissal Of The State Law Claims**. The Second Circuit's not-for-publication, not-for-citation "summary order," in dismissing the state law claims, was illogical in a way that no non-politicized court would be. The Second Circuit relied solely on the District Court's opinion (Pet. App. A 5), but the District Court's rulings on the state law claims rested on certain points of the District Court's denial of Dean Rohan's § 1983 claim which the Second Circuit did not adopt and which were unsupportable. The District Court's rejection of Dean Rohan's state constitutional claim was based entirely on the erroneous conclusion that the ABA was not engaged in state action when inspecting and approving law schools for attorney licensing purposes -- a conclusion that the Second Circuit said it did not reach. (Pet. App. A 3.) The Second Circuit's reliance on the District Court with respect to the state constitutional claim was particularly indefensible because of the District Court's failure to recognize the New York Constitution's independent, broader and more flexible "state involvement" test for the application of the New York Constitution's due process clause, based on a state constitutional text that does not expressly require state action and a state constitutional history sensitive to the protection of individual liberties. *Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152, 159, 379 N.E.2d 1169, 1173, 408 N.Y.S. 39, 43 (1978). Dean Rohan's promissory estoppel claim (asserting that the ABA has a common law due process obligation) was rejected by the District Court on the ground that a third party cannot be liable in a § 1983 action, which was contrary to all precedent (*supra*, p. 22) and again not adopted by the Second Circuit.

6. **The Second Circuit's Not-For-Publication, Not-For-Citation "Summary Order" Was An Abusive Denial Of Due Process And Equal Protection Of The Laws**. Dean Rohan's case provides an example to vindicate the criticism by practitioners about the misadministration of justice by not-for-publication, not-for-citation opinions by federal appellate courts and to show that stated justifications for such not-for-publication, not-for-citation decisions are unsupportable.

Attorney John Kester has rightly written: "Judges should not be the ones to decided which of their opinions get reported and used. The temptation is to bury shoddy reasoning or to tailor results to particular parties. Supreme Court Justice Owen Roberts worried half a century ago that if precedent can be routinely ignored, the law becomes 'a restricted railroad ticket, good for this day and train only.' We expect our courts to build on prior decisions and to explain why not if they don't. If they select some decisions to be secret, or stamp them as second-class nonprecedents -- like Orwell's nonpersons -- then judges themselves undermine the rule of the law." Kester correctly added that "unpublished decisions are not always short and simple" and that "Courts sometimes seem to use 'unpublished' labels to discourage higher courts from reviewing what they have done." John G. Kester, Esq., "Rule of Law: Appeals Courts Keep More and More Opinions Secret," *Wall St. J.*, p. A15 (Dec. 13, 1995). Here, as Kester would predict and as demonstrated above (pp. 12-28), the Second Circuit's not-for-publication, not-for-citation "summary order" served as a manipulative device, incompatible with the rule of law, burying shoddy reasoning, tailoring an otherwise indefensible result in favor of the ABA, and seemingly designed to avoid review by this Court.

The defense of not-for-publication, not-for-citation opinions has been stated by Second Circuit Chief Judge Jon Newman, who asserted that they are still publicly available and that the "no publication/no citation" approach" -- to quote Judge Newman -- "is used for the many appeals that can be summarily decided on the basis of prior court precedents, without the need for a full opinion that would add nothing new to the law. Such appeals are decided much more expeditiously when courts need not prepare full opinions with detailed recitation of the facts." Judge Jon O. Newman, "Letter to Editor: No 'Secret' Opinions On Appellate Courts," *Wall St. J.*, p. 9 (Jan. 2, 1996). But here, flatly contrary to the assurance of Chief Judge Newman, the Second Circuit's not-for-publication, not-for-citation "summary order," when addressing the central issue of state action, was *not* based on prior court precedent. *No* precedent at all was even cited, even

though at stake was a federal constitutional issue of importance to legal education and society and was briefed as a case posing a constitutional question of first impression at the federal appellate level. On "property" and "liberty" issues, the cursory citation by the Second Circuit to authority dressed up a result that could not bear examination without showing the shoddy errors committed. Even worse, the avoidance of a "detailed recitation of the facts" by the Second Circuit in its not-for-publication, not-for-citation "summary order" avoided dealing with the District Court's jaundiced mistreatment of the record and with Dean Rohan's submitted proof establishing that the ABA did deny due process of law.

Here, in short, there was an abuse by the Second Circuit of the practice of not-for-publication, not-for-citation "summary orders" -- an abuse that must be considered an effective denial of due process of law and equal protection of the laws under the Fifth Amendment to Dean Rohan. Litigants have a right to expect that Article III courts will decide their "cases and controversies" on the merits according to the applicable law and record evidence and not give preferential treatment to the politically influential who have a critical say in the composition of the federal judiciary.

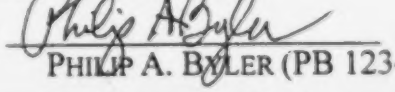
CONCLUSION

For the reasons stated above, a writ of certiorari should be issued to review and reverse the decision and judgment of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
August 7, 1996

Respectfully submitted,

PHILIP A. BYLER, ESQ.

By: 

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APPENDIX

Appendix A
Second Circuit Not-For-Publication, Not-For-Citation "Summary Order."

EDNY/SDNY
93-CV-1338
JOHNSON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of February one thousand nine hundred and ninety-six.

PRESENT: HONORABLE J. DANIEL MAHONEY,
HONORABLE JOHN M. WALKER, JR.,
HONORABLE GUIDO CALABRESI,

Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
FEB 21 1996
GEORGE LANG III, CLERK
SECOND CIRCUIT

DR. PATRICK J. ROHAN,

Plaintiff-Appellant,

- v. - **No. 95-7601**

THE AMERICAN BAR ASSOCIATION, CLAUDE R. SOWLE, JAMES P. WHITE, R. WILLIAM IDE III, BARBARA B. LEWIS, PHILLIP D. SHELTON, GEORGE S. GROSSMAN, AND BRADLEY J.B. TOBEN,

Defendants-Appellees.

APPEARING FOR APPELLANT:
Philip A. Byler, New York, New York.

APPEARING FOR APPELLEE:
David T. Pritkin, Sidley & Austin, Chicago, Illinois.

Appeal from the United States District Court for the Eastern District of New York (Sterling Johnson, *Judge*).

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

1. Plaintiff-appellant Patrick J. Rohan, the former Dean of St. John's University School of Law, appeals from a judgment entered June 5, 1995 in the United States District Court for the Eastern District of New York that granted the motion of defendants-appellees The American Bar Association (the "ABA"), Claude R. Sowle, James P. White, R. William Ide III, Barbara B. Lewis, Philip D. Shelton, George S. Grossman, and Bradley J.B. Toben for summary judgment

dismissing Rohan's complaint, which asserted claims pursuant to 42 U.S.C. § 1983 and state law.

2. We do not reach the issue whether the ABA is generally a state actor in connection with its law school accreditation activities. The conduct of which Rohan complains is essentially incidental to the accreditation process and the nexus between that process and state bar admissions. In substance, Rohan complains that defendants-appellees so disparaged him to the administration of St. John's University that, as a direct consequence, he was compelled first to take an abrupt research leave from, and ultimately to resign, the deanship. Defendants-appellees could not arguably be considered state actors, however, unless they made adverse comments to the university administration at their exit interview which linked Rohan's removal from the deanship to a successful reaccreditation of the law school. Rohan has not established a triable issue of fact that this occurred. See *United States v. Articles of Banned Hazardous Substances Consisting of An Undetermined Number of Cans of Rainbow Foam Paint*, 34 F.3d 91, 96 (2d Cir. 1994) (summary judgment should be entered against plaintiff when incapable of establishing essential element of case).

3. The affidavit of Claude R. Sowle, chairman of the ABA site evaluation team, asserts that "[a]t no point [during the exit interview] did any Team member suggest, recommend or demand that then-Dean Rohan be removed as Dean of St. John's." Barbara Morris, who attended the exit interview with President Harrington and the ABA site evaluation team, drafted a report summarizing what took place at the exit interview. The report included the following statement:

> A significant split exists between the Dean and some members of the faculty, for which the untimely election acted as a trigger. This split is vastly different from the conditions at the time of the 1993 site evaluation, when the Dean had widespread support of faculty, students and alumni. The team did not want to discuss the "unsigned" report, but the

> Dean was reported as being unavailable, unresponsive, vindictive and apt to practice cronyism. There is a deep level of affection among some other faculty for the Dean. The Dean and the faculty need to work together.

4. In response, Rohan provided affidavits by himself and his then-counsel, Boris Kostelanetz, which essentially speculate that the university administration acted adversely to Rohan in the aftermath of the exit interview because of a perceived threat of disaccreditation that his removal would alleviate. Rohan did not pursue further discovery on this issue, stating that "the depositions of defendants are not necessary to defeat defendants' motion" for summary judgment. However, "a party may not 'rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment.'" *Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995) (quoting *Knight v. United States Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986), *cert denied*, 480 U.S. 932 (1987)). In light of the explicit assertion by Sowle that Rohan's dismissal from the deanship was not even suggested at the exit interview, and Morris' more complete summary of the discussion concerning Rohan without any mention of actions against Rohan, the affidavits of Rohan and Kostelanetz do not establish a triable issue of fact that the administration's subsequent actions regarding Rohan resulted from apprehension concerning reaccreditation that were generated by the exist interview. Nor do Rohan's vague speculations about "further phone communications between University President Harrington and ABA representatives just after the Team left town" fill the void.

5. In addition, Rohan has not established either a property interest or a liberty interest that satisfies the requirements of § 1983. Accepting Rohan's description of the general assurances provided by then-President Cahill concerning the tenure of Rohan's deanship, there was not an adequately explicit understanding to elevate Rohan's deanship beyond an employment at will under New York law. *See Wright v. Cayan*, 877 F.2d 999, 1002-03 (2d Cir.) (collecting cases), *cert denied*,

484 U.S. 853 (1987). Nor does Rohan adequately assert a deprivation of a liberty interest. As we recently stated, the establishment of such an interest requires "much more than a loss of employment flowing from the effects of simple defamation." *Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994); *see also Siegert v. Gilley*, 500 U.S. 226, 234 (1991).

6. We affirm the dismissal of Rohan's state law claims substantially for the reasons stated by the district court. *See Rohan v. American Bar Ass'n*, No. 93 CV 1338 (SJ), slip op. at 26-32 (E.D.N.Y. May 31, 1995).

/s/ Hon. J. Daniel Mahoney

Hon. J. Daniel Mahoney, U.S.C.J.

/s/ Hon. John M. Walker, Jr.

Hon. John M. Walker, Jr., U.S.C.J.

/s/ Hon. Guido Calabresi

Hon. Guido Calabresi, U.S.C.J.

Appendix B
District Court Unpublished Opinion

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DR. PATRICK J. ROHAN,

Plaintiff,

- against -

THE AMERICAN BAR ASSOCIATION, CLAUDE R. SOWLE, JAMES P. WHITE, R. WILLIAM IDE III, BARBARA B. LEWIS, PHILIP D. SHELTON, GEORGE S. GROSSMAN, and BRADLEY J.B. TOBEN,

Defendants.

93 CV 1338 (SJ)

MEMORANDUM AND ORDER

APPEARANCES

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JOHNSON, District Judge:

INTRODUCTION

This case was brought by Professor Patrick Rohan ("Plaintiff"), former Dean of the St. John's University School of Law ("St. John's") against the American Bar Association ("ABA") and seven named individuals associated with the ABA (collectively, the "Defendants"). Plaintiff alleges (1) that he was denied procedural and administrative due process in violation of 42 U.S.C. § 1983; (2) that Defendants tortiously interfered with his contractual relationship with St. John's; (3) that Defendants breached their common law duty to afford due process; (4) that he was denied due process under the New York State Constitution; and (5) that Defendants committed several acts of negligence in the training of evaluators and supervision of the site evaluation process, which resulted in damages to Plaintiff. On each of his claims, Plaintiff is seeking an amount not less than $2,000,000 in compensatory damages and not less than $2,000,000 in punitive damages, plus interest.

Before this Court is Defendants' motion for summary judgment on each of Plaintiff's claims pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons detailed herein, this Court grants Defendants' motion in its entirety.

BACKGROUND

THE AMERICAN BAR ASSOCIATION

In order to understand the facts giving rise to this action, a brief history of the ABA and the accreditation process is necessary. The ABA, a not-for-profit professional organization,

was created in 1878 to "advance the science of jurisprudence, promote the administration of justice, and uniformity of legislation throughout the Union to uphold the honor of the profession of law and encourage social intercourse among the members of the American Bar."[1] It was incorporated under the laws of the State of Illinois and has more than 375,000 members nationwide. (White Aff. ¶ 4.)

In 1921, the ABA adopted its statement of minimum standards of legal education and provided for the publication of a list of schools that complied with those standards. Since then, the ABA has been conducting on-site inspections and evaluations of law schools throughout the United States to determine whether they comply with the standards for legal education set by the ABA.[2] The performance of such evaluations are governed by the ABA's "Rules of Procedure for Approval of Law Schools."

One of the ABA's committees, the ABA Accreditation Committee ("Accreditation Committee" or "Committee"), is charged with the responsibility of reviewing inspection reports on both approved and unapproved law schools. Law schools must be provisionally approved for at least two years before seeking full approval. Once fully approved, law schools are evaluated every seven years, unless a situation develops requiring review at an earlier time. Visits to law schools are conducted in cooperation with the Association of American Law Schools ("AALS") for those schools which have been accredited by the ABA and which are members of the AALS.[3] (White Aff. ¶¶ 8, 14.)

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[1] Bernard G. Segal, *The American Bar Association, in* 1 *The Guide to American Law* 202 (1983) (quoting unidentified source).

[2] The Section of Legal Education and Admissions to the Bar is the section of the ABA that has been assigned the task of establishing and monitoring compliance with the ABA Standards for Approval of Law School.

[3] The Association of American Law Schools ("AALS") is an association of law schools dedicated to the "improvement of the legal profession through legal education." 1 *The Guide to American Law* 347 (1983)

(Footnote continued)

When evaluating a law school, the Accreditation Committee sends a group of trained professionals, including law professors, librarians, and practitioners, to survey the facility. The group members meet with faculty and staff, evaluate the academic program and curriculum, review financial data, examine the physical plant and submit a report to the Accreditation Committee. The submission of the report ends the role of the group members; they do not participate in the Committee's decision.

The Committee then reviews the report and the school's file, and recommends either full accreditation, probation, or withdrawal of accreditation.[4] The Committee's recommendation is then submitted to the Council of the Section of Legal Education and Admissions to the Bar of the ABA, which in turn submits its recommendation to the ABA House of Delegates which grants or withdraws approval to or from the law schools that apply for review. (Compl. Ex. B, Rules 20-22.)

THE INSTANT CASE

The facts of the instant case are relatively straightforward. At some time prior to March 28, 1990, the ABA received numerous communications from members of St. John's faculty, student body and alumni. These communications included a sixty-page report entitled "The Law School at St. John's: A Statement of Some Faculty Concerns" ("Faculty Report"), which was very critical of the law school's administration and

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(quoting unidentified source). It was created in 1900 and was incorporated under the laws of the District of Columbia in 1971. Along with the ABA, the AALS is recognized as one of the two national accrediting agencies for law by the Council on Post Secondary Accreditation.

[4] An institution adversely affected by a Committee action may petition the Committee for a review of its action. The institution may appeal to the council as a matter of right (1) any determination adverse to the institution relating to the granting of provisional or full approval; (2) determinations of hearing commissioners recommending removal of approval. 1 *The Guide to American Law* 200; *see also* Compl. Ex. B, Rule 22.

of Plaintiff in particular.[5] This report was unsigned, yet endorsed by 22 of the 34 tenured faculty members of the law school. (Sowle Aff. ¶ 6.)

On March 28, 29, 30 and 31, 1990, an ABA/AALS site evaluation team ("Team") visited St. John's as part of a periodic reaccreditation of that school. During this visit, members of the Team, the individual defendants in this action, met with administrators, professors, students and alumni of the law school and the President of St. John's University. The Team members also examined the physical facilities at St. John's, visited classes, assessed the quality of the faculty, reviewed admissions policies, evaluated the quality of the library, and reviewed information provided by St. John's regarding its records and finances. The Chair of the Team was Defendant Claude Sowle, Professor of Law and former Dean of the University of Miami Law School. Professor Sowle is currently Vice Chair of the ABA Accreditation Committee.

At an exit interview conducted at the end of the site evaluation, Team members (with the exception of Professor Lewis) met with Father Donald J. Harrington, President of the University ("President Harrington"). The Team members subsequently prepared a site evaluation report ("Evaluation Report") on their observations concerning St. John's. The Evaluation Report included findings of a high level of faculty/administration conflict, overcrowding and space limitations at the law school, and the inadequacy of resources for various Law School concerns. (Compl. at ¶¶ 51, 53, 58.) It also stated that Dean Rohan was "regarded as being unavailable, vindictive, heavyhanded, subject to fits of temper, prone to showings of favoritism, overly sensitive, and resistant [sic] to change."[6] (Compl. at ¶ 53.) These assertions were allegedly

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[5] The criticisms discussed in the Faculty Report included the following: (1) the insufficient inclusion of certain faculty members in institutional policy-making; (2) low faculty compensation; and (3) "irregular personnel actions," irregular course arrangements and inadequacies in the school's physical plant. (Compl. at § 35.)

[6] The Evaluation Report also noted the following:

(Footnote continued)

based on the Faculty Report and on oral statements by some faculty members. Plaintiff alleges that he did not have an opportunity to address the Faculty Report and the concerns raised by some faculty members during the ABA site visitation.

On April 17, 1990, less than one month after the evaluation was conducted, President Harrington announced that he had granted a 16-month research leave to Plaintiff. A few days later, on April 23, 1990, an article entitled, "St. John's Dean Takes Leave Abruptly," was printed in the *New York Law Journal.* Plaintiff alleges that, as a result of this article, rumors were spread that St. John's was in danger of losing its accreditation and that Plaintiff was thus being forced out as Dean.[7] (Compl. at ¶ 44.) On August 27, 1990, Plaintiff submitted his resignation, effective February 1, 1991, as Dean of St. John's.

Pursuant to ABA policy, the Evaluation Report was sent to President Harrington and Acting Dean Fagan on or about September 10, 1990. A copy of the Evaluation Report was provided to Plaintiff so that he could submit a response. In separate correspondences, President Harrington, Acting Dean Fagan and Plaintiff submitted responses to the Evaluation Report.

> Dean Rohan is intensely concerned about St. John's and enjoys a marked loyalty from most of the older, more influential alumni, just as the more senior, long-term faculty members tend to support him strongly. The Law School has enjoyed substantial progress and success in many areas, and much of it attributable to Dean Rohan's leadership.

(Compl. at ¶ 53.)

[7] Defendant James P. White, the Consultant on Legal Education to the ABA, issued an announcement in response to the rumors on April 24, 1990, in which he stated that St. John's was a fully approved law school and that Plaintiff's leave of absence was unrelated to St. John's approval status. (Compl. at ¶ 45.)

After considering the Evaluation Report and the responses thereto, the Accreditation Committee maintained St. John's status as an ABA-approved law school in a letter dated November 5, 1990. The Committee made no findings or conclusions with respect to Plaintiff, except a reference to the fact that Plaintiff had resigned as Dean of St. John's.

On November 19, 1991, an article appeared in *The New York Times* entitled, "Reeling from Unrest, St. John's Awaits New Law Dean." Plaintiff alleges that the ABA failed to preserve confidentiality with respect to the accreditation process. (Compl. at ¶¶ 73-75.)

DISCUSSION

I. Summary Judgment Standard

Summary Judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court's function is not to resolve disputed issues of fact, but only to determine whether there is a genuine issue to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Eastman Machine Co. v. United States*, 841 F.2d 469, 473 (2d Cir. 1988). No genuine issue exists

> unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Anderson, 477 U.S. at 249-50 (citations omitted). In making this determination, the court is required to view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970).

The party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

In addition, summary judgment is appropriate against a nonmovant who, after adequate time for discovery, fails to establish the existence of an element that is essential to his case and on which he will bear the burden of proof at trial. *Id.* at 322; *United States v. Pilot Petroleum Associates, Inc.*, 712 F. Supp. 1077, 1081 (E.D.N.Y. 1989).

II. 42 U.S.C. § 1983 Claim

Plaintiff asserts that Defendants deprived him of his Fourteenth Amendment right to due process of law in violation of 42 U.S.C. § 1983. In order to prevail on this claim, Plaintiff must establish that (1) Defendants acted "under color of" state law; (2) Plaintiff has a property or liberty interest protected by the Fourteenth Amendment; (3) Defendants intentionally deprived Plaintiff of that interest; and (4) the Constitution guarantees Plaintiff procedural rights above ordinary state law remedies. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 530-33 (1984); *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987).

A. Under Color of State Law Requirement

The Fourteenth Amendment to the United States Constitution[8] affords no protection from private conduct, no matter how offensive such conduct may be. *Shelley v. Kraemer*, 334

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[8] The Fourteenth Amendment of the United States Constitution provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. 1, 13 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). Liability under Title 42 U.S.C. § 1983,[9] the statutory remedy for constitutional violations, attaches only to conduct that occurs "under color of" state law. *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Hence, Plaintiff's § 1983 claim can survive only if (1) Defendants could be described in all fairness as state actors, and (2) the alleged deprivation "resulted from the exercise of a right or privilege having its source in state authority." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982).

1. State Action

The question of whether a private accrediting body's decision constitutes state action is, for this Court, one of first impression. In the typical state action case involving a private party, the private party takes the decisive action that causes harm to the plaintiff, and the question is whether the State was sufficiently implicated to treat the action as state action. *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 192 (1988). This inquiry is "necessarily fact bound," *Lugar*, 457 U.S. at 939, and is informed by several factors:

> [1] There is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself....[2] [The State] has exercised coercive power or has provided such significant encouragement, either overt or covert,

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[9] Title 42 U.S.C. § 1983 provides in full:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> that the choice must in law be deemed to be that of the State...[3] The private entity has exercised powers that are traditionally the exclusive prerogative of the State.

Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982).

In the instant case, Plaintiff asserts two rationales in favor of state action: (1) the delegation of state authority to the private party (the third factor articulated in *Blum*); and (2) the public function of or significant government involvment in the private party's action (the second *Blum* factor). (Pl.'s Mem. Opp'n Summ. Judg. at 72-83.) This Court concludes on the undisputed facts of this case that the ABA's conduct was not state action.

a. Delegation of State Authority

This case falls in the category of traditional state action cases involving a private party. Plaintiff's argument is that New York State has, delegated its authority to license attorneys to the ABA. This is so because "[i]n New York State, a degree from an ABA-accredited law school is effectively required." (Pl.'s Mem. Opp'n Summ. Judg. at 76.) Moreover, the United States Department of Education recognizes the ABA as the sole national accrediting agency for professional law schools.

Plaintiff points to the Supreme Court's decision in *West v. Atkins,* 487 U.S. 42 (1988), in support of his argument. In *Atkins,* a prison inmate successfully brought a § 1983 action against a private physician who was under contract with the State of North Carolina to provide orthopedic services at a state prison hospital on a part-time basis. The Supreme Court's decision in *Atkins,* however, turned on the fact that under state law, the only medical care the inmate could receive for his injury was that provided by the state. *Id.* at 54. Since supplying adequate health services to prisoners was the exclusive prerogative of the state, the delegation of that function to the private physician could not insulate the physician's actions from a finding of state action for purposes of § 1983.

Unlike *Atkins*, the State of New York has not explicitly delegated to the ABA its responsibility for setting the requirements that an individual must meet in order to be licensed as an attorney-at-law. To become a member of the New York Bar, an individual must comply with the Rules of the New York Court of Appeals on admission to practice. These Rules require either study at an approved law school (Ct. App. § 520.3), law office study (Ct. App. § 520.4), or law study in a foreign country (Ct. App. § 520.5). Plaintiff argues that these Rules effectively require ABA-accredited law study in New York. (Pl.'s Mem. Opp'n Summ. Judg. at 76.) Even if this Court accepts that this proposition is true, this Court finds nonetheless that any conferral of monopoly status on the ABA by New York State does not convert the ABA into a state actor.

The ABA receives no funds from the New York Judiciary or the Board of Bar Examiners in connection with its accreditation activities.[10] It has no power to subpoena witnesses, to impose contempt sanctions, nor to assert sovereign authority over any individual. Moreover, the power to prescribe rules governing attorney conduct and to discipline attorneys for violating those rules is vested in the New York Judiciary.

Plaintiff also emphasizes the fact that Defendants' own documents recognize that Defendants exercise delegated state authority. (Pl.'s Mem. Opp'n Summ. Judg. at 73-76.) Contrary to Plaintiff's contention, however, statements made by representatives from the ABA cannot be the basis on which state action is found. *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 554 (9th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975) ("defendant's self-proclaimed authority will not suffice" to establish state action); *see also Canlis v. San Joaquin Sheriff's Possee*, 641 F.2d 711, 717 (9th Cir.) (unilateral

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[10] Law schools pay fees to the ABA in connection with the approval process. Such fees account for approximately one-half of the ABA's annual expenditures incurred in connection with accreditation-related activities. (White Aff. ¶ 17.)

adoption of indicia of state authority does not make private party a state actor, absent formal delegation), *cert. denied*, 454 U.S. 967 (1981). The ABA's pronouncements on the state action question and its acknowledgment of its "quasi-judicial authority" are not germane to the inquiry.

Finally, the fact that New York State recognizes the expertise of the ABA in evaluating law schools and relies on the ABA's decisions in this regard, does not transform such decisions into state action. *See Tarkanian*, 488 U.S. at 194 (state university's suspension of basketball coach in compliance with NCAA recommendation did not convert NCAA decision into state action)[11]; *Blum*, 457 U.S. at 1004-05 (state officials' adjustment of Medicaid benefits in response to private nursing homes' decisions to discharge or transfer patients did not render the state responsible for those decisions).

The ABA is self-governed, and the standards by which it conducts its evaluations of law schools have been set by the ABA itself, not by the State of New York. Defendants in this case do not act pursuant to any contractual relation with the State of New York. Indeed, Plaintiff has not established the existence of a close "symbiotic relationship" between the acts of the ABA and the State of New York. *See, e.g., Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (state action present when private lessee rented space for restaurant in public building from state parking authority). *But see Lawline v. American Bar Association*, 956 F.2d 1378 (7th Cir.

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[11] Plaintiff is correct in asserting that "*Tarkanian* involved a different claim of 'state action.'" (Pl.'s Mem. Opp'n Summ. Judg. at 88.) This Court is not persuaded, however, by Plaintiff's argument that the "delegation" in this case is a stronger case for a finding of state action than the facts of *Tarkanian*. In *Tarkanian*, it was the state of Nevada (the University of Nevada, Las Vegas), not a private party, that took the final action that harmed the plaintiff. In the instant case, Plaintiff's claim is more tenuous: a private party's actions have 14th Amendment implications because of an alleged "implied delegation" of authority by New York State's judiciary to the ABA. *See* Pl.'s Mem. Opp'n Summ. Judg. at 88.

1992) (no state action when private bar group recommends rules to regulate lawyers, which may or may not be adopted by state court). Nor has Plaintiff established that the State of New York abdicated its authority to the ABA with respect to legal education.

b. Significant Government Involvement

Plaintiff also argues that the exercise of the ABA's power or function as a law school accrediting agency renders it a state actor because its role is traditionally the exclusive prerogative of the State of New York. Plaintiff's reliance on *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), is unavailing.

In *Edmonson*, the Supreme Court held that if a private party exercises peremptory challenges in a civil case in a manner that would offend *Batson v. Kentucky*, 476 U.S. 79 (1986), such action by the private party constitutes state action subject to equal protection limitations. In *Edmonson*, the private party could not have exercised peremptory challenges absent overt, significant assistance from the state officers in the process of striking jurors. The Supreme Court noted that peremptory challenges have no utility outside the court system, a system administered exclusively by the government. *Id.* at 621.

Unlike the private party in *Edmonson*, the ABA does not invoke the formal authority of the State in its capacity as an accrediting agency. Far from wearing the "badge" of governmental authority, the ABA was not established by the State of New York, nor is it funded or supported by the State. *See Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 487 (1988) ("pervasive and substantial" state involvement); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Nor was the alleged injury in this case aggravated in a unique way by the incidents of governmental authority. *See Shelley v. Kraemer*, 334 U.S. 1 (1948) (state courts called upon to enforce racially restrictive covenants against sellers of real property).

Plaintiff also points to Defendant White's assertion in the 1990-1991 Annual Report of the Consultant to the ABA Section on Legal Education: "the process for determining admission to the bar is a public licensing function....[and the courts] look to the ABA's law school accreditation standards to determine bar admissions criteria." (Pl.'s Mem. Opp'n Summ. Judg. at 81.) Again, however, the fact that "the ABA holds itself out to the United States Department of Education, the State governments, the courts and the public as the appropriate agency for supervising the quality of law school education" (Pl.'s Mem. Opp'n Summ. Judg. at 81) is legally insufficient evidence for a finding of state action.

Moreover, school accreditation has been recognized as a function of private entities, *see Transport Careers, Inc. v. National Home Study Council,* 646 F. Supp. 1474, 1479 (N.D. Ind. 1986), and not a function that "has been traditionally the exclusive prerogative of the State." *See Rendell-Baker v. Kohn,* 457 U.S. 830, 842 (1982). The fact that New York State recognizes the ABA as an accrediting agency for law schools supports this proposition. While the ABA does perform a critical role in evaluating the quality of legal education in New York, it is the State of New York that has created the regulatory framework governing legal education and the licensing of attorneys. In this regard, New York State is the final arbiter for matters regarding legal education in New York. Plaintiff cites no authority, and this Court knows of none, that establishes the evaluation of the quality of education as an exclusive state function.

Finally, the notion that the ABA is a state actor in connection with its accreditation activities was considered and rejected by a district court in *Zavaletta v. ABA,* No. 89 326-N, at 4 (E.D. Va. May 5, 1989) (bench opinion). In *Zavaletta,* a third-year class of Christian Broadcasting Network University Law School sought, *inter alia,* a preliminary injunction under section 1983 requiring the ABA to accredit the law school. The court granted summary judgment to the ABA on all counts, dismissing the section 1983 claim on the grounds that the ABA was not a state actor.

2. Exercise of a Right or Privilege having its Source in State Authority

The second inquiry with respect to § 1983 claims is whether the alleged deprivation "resulted from the exercise of a right or privilege having its source in state authority." *Lugar*, 457 U.S. at 939. In order for Plaintiff to invoke the Fourteenth Amendment's Due Process Clause, Plaintiff's resignation as Dean must have resulted from the exercise of state authority.

a. The Fourteenth Amendment

Even if Defendants were state actors, Plaintiff must have a protected property interest in his position as Dean and in his professional standing in the legal community in order to prevail on his § 1983 claim. In this case, it is undisputed that Plaintiff had no employment agreement with St. John's with respect to his Deanship, and was thus an at-will employee. *See, e.g., Wright v. Cayan*, 817 F.2d 999, 1002-03 (2d Cir.) (citations omitted) (affirming summary judgment), *cert. denied*, 484 U.S. 853 (1987). His indefinite duration of service as Dean and the University's right to terminate him were discretionary. Thus, he possessed no property interest in his position as Dean. *See, e.g., Campbell v. Champaign*, 940 F.2d 1111, 1112 (7th Cir. 1991) (holding that at-will employment relationships do not give rise to property interests protectable under the Fourteenth Amendment).

Plaintiff also includes "injury to reputation" and the loss of economic interests in his allegation that he was deprived of a constitutionally protected interest. (Pl.'s Mem. Opp'n Summ. Judg. at 98.) The Supreme Court in *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), however, rejected this argument. Injury to reputation, even coupled with economic damages flowing therefrom, is not an injury of constitutional dimension. *Id.* at 1794; *Paul v. Davis*, 424 U.S. 693, 711-12 (1976).

Accordingly, this Court finds that Plaintiff's interests in his Deanship at St. John's and in his reputation are outside the scope of the Fourteenth Amendment's protections.

b. Deprivation of Interest

Finally, even assuming that Plaintiff had constitutionally protected interests in this case, and he does not, it is not clear on what basis Defendants deprived Plaintiff of any interest. Plaintiff relinquished his interest as Dean in his resignation letter to St. John's. To the extent that his resignation was not "voluntary" in a legal sense,[12] only the University--not the Defendants-- could have dismissed Plaintiff from his position as Dean. Section 1983 does not hold persons liable for the acts of third parties. *Shinholster v. Akron Auto. Ass'n,* 711 F. Supp. 357, 363 (N.D. Ohio 1989) (holding that termination by private employer under contract with state was not actionable under § 1983).

B. Other § 1983 Factors

Because this Court finds that the alleged violations in this case did not occur under color of state law, a jurisdictional prerequisite to a § 1983 action, this Court will not address the rest of the § 1983 factors. Defendants' motion for summary judgement on the § 1983 claim is granted.

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[12] Plaintiff argues that his resignation from the administration of St. John's was a direct product of coercion and duress. (Pl.'s Mem. Opp'n Summ. Judg. at 110.) This argument, however, is attenuated by Plaintiff's own admission:

> I believed -- and believe -- that the University could *not* remove me from the Deanship without "cause" and that no such "cause" existed. I nonetheless "retired" from the Deanship of St. John's University School of Law because I had eight children to support (including several in college), and couldn't afford the immediate loss of the bulk of my income. I also hoped to avoid public controversy over my termination, while the Law School's status was under review.

(Rohan Aff. ¶ 79.) In any event, this Court need not resolve the voluntariness of Plaintiff's termination. Based on the record in this case, this Court finds that Defendants' conduct was not the proximate cause of the alleged damages suffered by Plaintiff.

III. The New York State Constitution

Defendants also move for summary judgment on Plaintiff's due process claim under the New York State Constitution. Defendants argue that since the due process clause of the New York State Constitution does not apply to private conduct, *Montalvo v. Consolidated Edison Co.*, 92 A.D.2d 389, 393-94, 460 N.Y.S.2d 784, 787 (1st Dept. 1983), *aff'd*, 61 N.Y.2d 810, 473 N.Y.S.2d 972 (1984), Plaintiff's claim must fail as a matter of law. This Court agrees.

The New York State Constitution provides, in relevant part: "[n]o person shall be deprived of life, liberty or property without due process of law." N.Y. CONST., art. I, § 6.

Plaintiff is correct in asserting that the state action inquiry has received different constructions for purposes of the federal and New York State Constitutions. *Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152, 159, 379 N.E.2d 1169, 1173, 408 N.Y.S.2d 39, 43 (1978). New York's "more flexible State involvement requirement" notwithstanding, Plaintiff's state constitutional claim fails for the same reasons his § 1983 claim fails. *Sharrock*, 45 N.Y.2d at 160, 403 N.Y.S.2d at 44.

New York courts have recognized a dichotomy between state action, which is subject to scrutiny under the New York State Constitution, and private action, which is insulated from such scrutiny. The factors such courts have considered in making the state action determination include the "source of authority. for the private action," "whether the state is so entwined with the regulation of the private conduct as to constitute state activity," and "whether there has been a delegation of what has traditionally been a state function to a private person." *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 505, 488 N.E.2d 1211, 1217, 498 N.Y.S.2d 99, 105 (1985) (citations omitted); *see also Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 408 N.Y.S.2d 39, 45 (1978) (state action exists where State delegates "one of the essential attributes of sovereignty"). Hence, the threshold inquiry under the New York State Constitution is essentially whether the state has

been sufficiently implicated in the activity challenged to transform such activity into state action.

For the reasons outlined above, this Court finds that there was no state action by the ABA in this case. Consequently, Defendants are entitled to summary judgment on Plaintiff's due process claim under the New York State Constitution.

IV. Promissory Estoppel Claim

Defendants also move for summary judgment on Plaintiff's promissory estoppel claim. Plaintiff's argument is essentially that "Defendants had a common law duty to afford due process, having promised to provide such due process and 'quasi-judicial' conduct in order to be delegated the responsibility of supervising law school quality and being estopped thereby from denying said duty." (Compl. at ¶ 102.) Plaintiff alleges that Defendants breached such duty to afford due process, causing damage to Plaintiff. (Compl. at ¶ 103.)

In order to establish a claim for promissory estoppel under New York law, Plaintiff must prove the existence of (1) "a clear and unambiguous promise; (2) a reasonable and foreseeable reliance by the party to whom the promise is made; and (3) an injury sustained by the party asserting the estoppel by reason of his reliance." *City of Yonkers v. Otis Elevators Co.*, 844 F.2d 42, 48 (2d Cir. 1988) (numbers added) (quoting *Ripple's of Clearview, Inc. v. Le Havre Assoc.*, 88 A.D.2d 120, 122, 452 N.Y.S.2d 447, 449 (2d Dept. 1982)). Hence, the underlying promise upon which reliance was based must have been communicated to the plaintiff under the promissory estoppel doctrine. *See, e.g., Tutak v. Tutak*, 123 A.D.2d 758, 507 N.Y.S.2d 232 (2d Dept. 1986).

In the case before this Court, Plaintiff alleges that Defendants promised to provide due process and quasi-judicial conduct to St. John's and to Plaintiff. Plaintiff, however, alleges insufficient facts to establish the third prong of the promissory estoppel doctrine: injury to Plaintiff by reason of his reliance. This Court finds that Plaintiff's alleged injuries were not proximately caused by Defendants. Thus, Plaintiff's

promissory estoppel claim is not viable against Defendants; this Court grants summary judgment to Defendants on this claim.

V. Plaintiff's Tort Claims

Defendants also move for summary judgment on Plaintiff's tort claims-- the tortious inteference with contract claim and the negligence claim. Defendants advance several arguments in support of their summary judgment motion on these claims including the following: (1) the claims are subject to New York's one year statute of limitations governing claims for "false words"; and (2) Defendants' alleged statements about Plaintiff and St. John's are privileged. Because this Court finds that Plaintiff's allegations with respect to the tort claims are legally defective, this Court does not address the merits of the above-mentioned grounds for summary judgment.

1. Tortious Interference with Contractual Relationship

Plaintiff's first tort claim is that "Defendants, without any justification or privilege, but with malice on the part of defendant Sowle, tortiously interfered with Professor Rohan's relationship with St. John's University...." (Compl. at ¶ 100.) Plaintiff alleges that Defendants' statements concerning Plaintiff caused him to lose his position and salary as Dean, directors' fees, expert witness consulting fees and royalties. (Compl. at ¶ 80.)

Defendants correctly argue that New York does not recognize a claim for tortious interference with an at-will contract. *See, e.g., Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 188, 538 N.Y.S.2d 771 (1989) (affirming summary judgment). Since Plaintiff's position as Dean of St. John's was governed by an at-will contract (Connolly Aff. ¶¶ 2-5), his termination from that position cannot be the basis of a tortious interference with contract claim. Accordingly, Defendants are entitled to a judgment on this claim as a matter of law.

2. Negligence

Plaintiff also seeks recovery against Defendants ABA, White and Sowle for negligent supervision and training of the Team members. Defendants argue, *inter alia,* that they are entitled to summary judgment on this claim because under New York law, a negligence action seeking recovery for economic loss will not lie. This Court agrees.

Under New York's "economic loss" rule, a claimant who has not suffered personal or property injury, but only economic loss, is restricted to an action in contract for the benefit of its bargain. *Carmania Corp. v. Hambrecht Terrell International,* 705 F. Supp. 936, 938 (S.D.N.Y. 1989); *Key International Mfg., Inc. v. Morse/ Diesel, Inc.,* 142 A.D.2d 448, 536 N.Y.S.2d 792 (2d Dep't 1988). Thus, to the extent that Plaintiff's negligence claim is one for economic loss, it is not cognizable under New York law.

Moreover, as discussed earlier, this Court finds that the alleged injuries sustained by Plaintiff were not proximately caused by Defendants. Accordingly, Plaintiff's negligence claim must fail as a matter of law.

Conclusion

For the reasons set forth herein, this Court hereby GRANTS Defendants' summary judgment motion in its entirety.

SO ORDERED.

/s/ Sterling Johnson Jr.

U.S.D.J.

Dated: Brooklyn, New York
May 31, 1995

Appendix C
Second Circuit Order Denying Petition For Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III **MANDATE**
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of May, one thousand nine hundred and ninety-six.

Rohan

Plaintiff-Appellant,

v

Dkt No: 95-7601

The American Bar

Defendants-Appellees,

UNITED STATES COURT OF APPEALS
FILED
MAY 20 1996
GEORGE LANGE III,
CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Rohan.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador

Beth J. Meador,
Administrative Attorney

Appendix D
Constitutional, Statutory and Regulatory Provisions.

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Title 42 of the United States Code, section 1983 provides in pertinent part:

> Every person who, under color of any ordinance, regulation, custom, or usage, of any State . . . subjects, or caused to be subjected any citizen of the United States . . . to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be labile to the party injured in an action at law, suit in equity, or other than proceeding for redress.

3. Article 1, Section 6 of the New York State Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law.

4. Rule 56(c) of the Federal Rules of Civil Procedure provides:

> . . . The judgment sought shall be rendered forth with if the pleadings, depositions answers to interrogatories, and admissions on files, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law . . .

5. Rule 26 of the ABA Rules Procedure provides in pertinent part:

RULE 26
Periodic Evaluation
of Fully Approved Law School

(c) The Consultant shall arrange for a site evaluation of each fully approved law school by a team of qualified and objective persons. . . .

(d) . . . A site evaluation usually requires at least three days, as classes are visited, faculty quality assessed, admissions policies reviewed, records inspected, physical facilities examined, the library assessed, information set forth in the questionnaire reviewed, and consultations held with the president, dean of the law school, members of the law school faculty, professional staff, law students and members of the legal community.

6. Rule 34 of the ABA Rules Procedure provides in pertinent part:

RULE 34
Complaints Concerning Actions of Approved
Law Schools

(a) A current or former faculty member, applicant for faculty appointment, current or former student, applicant for admission, or any other person may file with the Consultant a written complaint alleging non-compliance with the Standards by an approved law school. A complaint may be filed only within 180 days of the complainant's learning of the basis for the complaint.

(b) When the complaint is filed, the Consultant shall acknowledge its receipt and inform the complainant of the Association complaint procedures. If the Consultant determines that the complaint does not allege facts constituting non-compliance with the Standards, the Consultant shall dismiss the complaint and so inform the complainant. A complaint alleging only a violation of a school's rule not

amounting to non-compliance with the Standards shall not be considered. Neither the American Bar Association nor any of its components determines the rights or remedies of individual complainants. The complainant shall not be afforded individual relief.

(c) . . . If the complainant agrees to the disclosure, the Consultant shall send a copy of the complaint to the dean of the law school and request the dean to respond to the allegations in the complaint and to provide any additional information requested by the Consultant.

(d) Upon receipt of the response of the dean of the law school, the Consultant shall:

(1) Dismiss the complaint if the Consultant determines that the complaint and the dean's response considered together do not support a claim that the school is in non-compliance with the Standards. The Consultant shall notify the complainant and the dean of the school of this determination; or

(2) Place the complaint on the agenda for the next site evaluation of the law school if the Consultant determines that the complaint and the dean's response considered together indicate conditions or practices that raise a question concerning the school's compliance with the Standards. The Consultant shall notify the complainant and the dean of the school of the action taken; or

(3) Place the complaint on the agenda of a Committee meeting if the Consultant determines that the complaint and the dean's response considered together indicate a

need for more complete investigation. The Consultant shall notify the complainant and the dean of the school of the action taken.

7. Rule 36 of the ABA Rules Procedure provides in pertinent part:

RULE 36
Access to Site Evaluation Reports and Committee and Council Action

(a) The reports of site evaluations are received in confidence by the site evaluation team, the Consultant and the Committee and Council and may be disclosed only with the approval of the Chairperson of the Council or the Consultant.

8. Council Policy Number 3 of the ABA Council Policies provides in pertinent part:

3. **Statement of Good Practice on Impartiality and Propriety in the Process of Law School Accreditation**

(A) Those who have significant responsibility in the process leading to accreditation of law schools serve a vital and quasi-judicial function in the legal system of the United States. It is important to the fair and effective functioning of the system of law school accreditation and to the maintenance of public and professional respect for that system that those who act in it act impartially and avoid even the appearance of impropriety.

9. Council Policy Number 12 of the ABA Council Policies provides in pertinent part:

12. **Confidentiality of Site Evaluation Reports and Letter Reporting Action**

> After notification to the school of the Committee action or the Council action, the school may disclose to others the Consultant's action letter. The Consultant may release to the public the status of the school, with an explanation of the Association's procedure for consideration of an application.

10. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty or property, without due process of law . . .

Appendix E
Excerpts from Complaint.

Plaintiff Dr. Patrick J. Rohan, by his attorney, Philip A. Byler, Esq., respectfully alleges to this Court as follows:

INTRODUCTION: THE GRAVAMEN OF THE COMPLAINT

1. The plaintiff, Dr. Patrick J. Rohan ("Professor Rohan"), has been a Professor of Law for 35 years and was Dean for over 10 years (1980-1991) at the St. John's University School of Law, has been an author or co-author of numerous legal treatises and has been a recognized authority in his fields of legal expertise. Professor Rohan brings this action to obtain redress for an unjustifiable denial of procedural and administrative due process (or for breaches of state law-derived duties) that inflicted damage upon his professional livelihood, including his relationship with the St. John's University School of Law and his opportunities for professional consultancies.

2. The defendant American Bar Association ("ABA"), operating under authority delegated by the State governments (including New York State) and the United States Department of Education, effectively regulates the establishment and operation of law schools throughout the United States; that regulation is essential because the States maintain, by law, requirements for individuals to be licensed as attorneys. The ABA, in carrying out its state regulatory function and acting as an instrumentality of the State, establishes criteria for the accreditation and operation of law schools and monitors compliance with these standards by means of, *inter alia*, an inspection and evaluation of each ABA approved law school every seven years. Such "site evaluations" are performed pursuant to "Rules of Procedure for Approval of Law Schools", so that the ABA can discharge its responsibilities effectively but fairly, consistent with the due process interests of affected individuals at the inspected law schools; those individuals -- such as Professor Rohan -- have a legitimate claim of

entitlement and thus a "property" interest in their employment and professional opportunities.

3. On March 28, 29, 30 and 31, 1990, such a "site evaluation" was performed by the ABA at the St. John's University School of Law. In this instance, however, the defendant ABA Site Evaluation Team under the leadership of defendant Claude R. Sowle, when conducting that "site evaluation" at the St. John's University School of Law, failed to follow the ABA's own rules and regulations governing the inspection and evaluation process, acted without required objectivity but instead with improper bias, relied upon anonymously made criticisms of the St. John's University School of Law, and failed to give Professor Rohan and the administration of the St. John's University School of Law any opportunity -- much less a meaningful opportunity -- to be heard concerning the matters being addressed by the ABA inspection and evaluation. As a result, there were unjustified criticisms by the ABA Site Evaluation Team, led by defendant Sowle, directed at Professor Rohan, who could no longer remain as Dean of the St. John's University School of Law, and an ABA "site evaluation" report was issued in September 1990 on the St. John's University School of Law that was error-ridden and reflected both the failure of the ABA Site Evaluation Team to observe the ABA's own rules and the bias of Site Evaluation Team Chair, defendant Sowle. Thereafter, the failure of procedural and administrative due process continued with and was exacerbated by: (a) the failure of the ABA, when purportedly reviewing the findings of the "site evaluation," to afford Professor Rohan a proper opportunity to be heard under the circumstances and (b) the breaches of confidentiality by the ABA and its representatives, again in violation of the ABA's own rules.

4. The foregoing wrongdoing, which is redressable under 42 U.S.C. § 1983 (or under state law-derived duties), unlawfully interfered with and damaged Professor Rohan's relationship with the St. John's University School of Law, his publishers and third parties, and Professor Rohan was thereby

unjustly damaged by the loss of income and the loss of professional opportunities. . . .

CAUSES OF ACTION

A. As And For A First Cause of Action (42 U.S.C. §1983: Denial of Due Process).

83. Professor Rohan repeats and reallege each and every allegation contained in paragraphs 1 through 82 above as though fully set forth herein.

84. Defendants' conduct described in this Complaint was subject to the requirements of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and subject to the requirements of due process under the New York State Constitution.

85. Professor Rohan had a "property" interest protected by the Fifth and Fourteenth Amendments to the United States Constitution and by the New York State Constitution because he had a legitimate claim of entitlement to his position as Dean of the St. John's University School of Law and to his professional standing in the legal community and consequent professional opportunities, such that the ABA's conduct in its law school accreditation and evaluation process could not, without due process of law, unfairly result in the loss of income, professional position and opportunities or other legally cognizable damage.

86. The ABA, as a matter of due process, was required to do at least the following: adhere to its own Rules of Procedure in the site evaluation and inspection process (including Rules governing impartiality, due process and confidentiality); not to rely on anonymous documentation without giving Professor Rohan a meaningful opportunity to address and reply to that anonymous documentation; to have a fair-minded Site Evaluation Team not chaired by an individual with bias and a lack of objectivity; to give Professor Rohan a meaningful opportunity to address concerns and criticisms of the Site Evaluation Team; and upon the failure of the ABA Site Evaluation Team to adhere to ABA Rules of Procedure, to

provide Professor Rohan a meaningful opportunity to be heard before the ABA Accreditation Committee. The value of such additional procedures (including adhering to the ABA Rules of Procedure) which were not employed by the ABA in this case would be to conduct a proper site evaluation and inspection and to afford an opportunity to correct possible error as a result of inadequate procedures followed before and during the ABA site evaluation visitation at St. John's Law School. While the governmental function of the review and accreditation of law schools is important, that importance cannot justify the failure of the ABA to follow its own Rules of Procedure, to rely on anonymous documentation, to fail to give a meaningful opportunity to the law school administration to address issues and anonymous communications, and not to provide a hearing before the ABA Accreditation Committee once the inadequacies of the Sowle Report were made known to the ABA. The burden of requiring the aforementioned procedures would be minimal and, indeed, would better serve the ABA in properly discharging its functions in the evaluation and inspection of law schools.

87. As quoted above, Rule 26 of the ABA Rules of Procedure and Council Policy Statement Number 3 required an "objective" ABA site evaluation team that consults with the law school dean.

88. The ABA Site Evaluation Team chaired by defendant Sowle at the St. John's University School of Law in 1990 violated, without justification, Rule 26 of the ABA Rules of Procedure.

89. Rule 34 of the ABA Rules of Procedure set forth a procedure for handling complaints from an approved law school.

90. Defendants ABA, White an Sowle violated, without justification, Rule 34 of the ABA Rules of Procedures by receiving oral complaints about the St. John's Law School from dissident faculty members prior to the visitation of the ABA Site Evaluation Team, but then not processing such complaints pursuant to Rule 34, thereby allowing such complaints to bias the ABA Site Evaluation Team. There was no excuse

for these violations because the ABA is chargeable with knowledge that many Law School faculties (including "Ivy League" faculties) are currently experiencing internal strife over economic issues; affirmative action programs (or lack thereof) with respect to faculty hiring and student enrollment; as well as divisions based upon philosophical differences (such as the "Critical Legal Studies" movement at Harvard Law School).

91. Rule 36 of the ABA Rules of Procedure imposed confidentiality requirements on defendants.

92. The ABA is responsible for breaches of confidentiality by those individuals who serve the ABA in the accreditation process. In this case, Rule 36 of the ABA Rules of Procedure was violated, without justification, by persons for which the ABA is responsible.

93. Defendants denied procedural and administrative due process to Professor Rohan by: (a) not giving him an effective opportunity to be heard before the ABA Site Evaluation Team reported severely negative criticisms of Professor Rohan to the administration for St. John's University and in the Sowle Report; (b) using the "Anonymous Dissident Document" as a substitute Self-Study without any consideration of law school administration views; (c) violating Rule 26 of ABA Rules of Procedure and Council Policy Statement Number 3 as set forth in paragraphs 87 through 88 above; (d) violating Rule 34 of the ABA Rules of Procedure as set forth in paragraphs 89 through 90 above; (e) not considering the submissions of Professor Rohan to the ABA Accreditation Committee; (f) under the circumstances presented herein, not providing a hearing involving an individual appearance to Professor Rohan before the ABA Accreditation Committee; (g) relying on a biased and error-ridden site evaluation report; and (h) violating Rule 36 of the ABA Rules of Procedure as set forth in paragraphs 91 through 92 above.

94. Defendants acted under color of State law in violation of Professor Rohan's constitutional rights, and the individual defendants -- defendant White (defendant Sowle and other

members of the ABA Site Evaluation Team were law professors or practicing attorneys) -- did so without any immunity because an objectively reasonable person -- particularly a person who has received a legal education and is associated with the ABA -- would have understood Professor Rohan's known constitutional rights to be violated.

95. Professor Rohan was injured in fact by having been adversely affected by the governmental action of the defendants in the site evaluation and accreditation process at St. John's University School of Law.

96. Professor Rohan has exhausted his administrative remedies, and the matter is judicially ripe for review.

97. Professor Rohan was damaged by defendants' denial of procedural and administrative due process in an amount to be proven at trial, but in no event less than the amount prayed for in the *ad damnum*.

98. There is no adequate remedy at state law.

B. As And For A Second Cause Of Action (Tortious Interference With Contract).

99. Professor Rohan repeats and realleges each and every allegation contained in paragraphs 1 through 97 above as though fully set forth herein.

100. Professor Rohan had a gainful employment relationship with St. John's University as the Dean of the St. John's University School of Law. Defendants, without justification or privilege, but with malice on the part of defendant Sowle, tortiously interfered with Professor Rohan's relationship with St. John's University, to the damage of Professor Rohan in an amount to be proven at trial, but in no event less than the amount prayed for in the *ad damnum*.

C. As And For A Third Cause of Action (Promissory Estoppel).

101. Professor Rohan repeats and realleges each and every allegation contained in paragraphs 1 through 82, 86 through 97 and 99 through 100 above as though fully set forth herein.

102. Defendants had a common law duty to afford due process, having promised to provide such due process and "quasi-judicial" conduct in order to be delegated the responsibility of supervising law school quality and being estopped thereby from denying said duty.

103. Defendants breached their promised duty to afford due process, causing damage to Professor Rohan in an amount to be proven at trial, but in no event less than the amount prayed for in the *ad damnum*.

D. As And For A Fourth Cause of Action (State Constitution).

104. Professor Rohan repeats and realleges each and every allegation contained in paragraphs 1 through 97 and 99 through 103 as though fully set forth herein.

105. Professor Rohan was damaged by defendants' denial of due process under the New York State Constitution in an amount to be proven at trial, but in no event less than the amount prayed for in the *ad damnum*.

E. As And For A Fifth Cause of Action (Negligence).

106. Professor Rohan repeats and realleges each and every allegation contained in paragraphs 1 through 82, 86 thorough 97 and 99 through 103 as though fully set forth herein.

107. Defendants ABA and White had duties: (a) to train Site Evaluation Team members so as to perform the duties of an ABA site evaluation properly and in accordance with ABA rules and regulations; (b) to supervise the performance of a Site Evaluation team so that ABA rules and regulations are implemented; (c) to supervise the functioning of the ABA site

evaluation process up through the ABA Accreditation Committee so that the interests of due process are served; (d) to remedy violations of ABA Rules, Policies and Procedures; and (e) to train and supervise the activities of the ABA Accreditation Committee.

108. Defendants ABA, White and Sowle were negligent in: (a) failing to train adequately the 1990 Site Evaluation Team at for the inspection at the St. John's University School of Law as to the nature of its function as "fact finders" (indeed, in a recent study, the ABA admits that it is grossly understaffed and under-financed and cannot adequately train Inspection Teams); (b) failing to acquaint those Site Evaluations Team members with the fact that all Team members are responsible for each and every segment of the Site Evaluation Report; (c) failing to acquaint those Site Evaluation Team Members with ABA Rules and Regulations concerning "Self-Studies"; (d) failing to acquaint those Site Evaluation Team members with ABA Rules and Regulations governing Site Evaluations (including, but not limited to, Rules governing impartiality, due process and confidentiality); (e) failing to supervise defendant Sowle's lack of objectivity and bias; (f) failing to act upon the overwhelming evidence of misfeasance and non-feasance by the Site Evaluation Team at the St. John's University School of Law; (g) failing to supervise the operations of the Accreditation Committee with respect to the March 1990 Site Evaluation at St. John's University School of Law; (h) failing to correct the errors and omissions of the Site Evaluation Team and Accreditation Committee with respect to the inspection of the St. John University School of Law; (i) failing to secure compliance with the ABA rules and regulations governing site evaluations; and (j) failing to prevent or remedy breach of confidentiality on the part of defendant Sowle and other members of the 1990 ABA Site Evaluation Team for the St. John's University School of Law.

109. As a direct consequence of the aforesaid negligent acts of commission and omission of the defendants ABA, White and Sowle, Professor Rohan was damaged in an amount to be

proven at trial, but in no event less than the amount prayed for in the *ad damnum*.

Appendix F
Excerpts from Dean Rohan's Affidavit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DR. PATRICK J. ROHAN, Plaintiff, -against- THE AMERICAN BAR ASSOCIATION, CLAUDE R. SOWLE, JAMES P. WHITE, R. WILLIAM IDE III, BARBARA B. LEWIS, PHILIP D. SHELTON, GEORGE S. GROSSMAN, and BRADLEY J.B. TOBEN, Defendants.	93 Civ. 1338 (SJ) AFFIDAVIT OF PLAINTIFF **DR. PATRICK J. ROHAN**

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PATRICK J. ROHAN, being duly sworn, deposes and says:

INTRODUCTION: WHY I BROUGHT THIS CASE

1. I am the plaintiff, Dr. Patrick J. Rohan. I have been a Professor of Law for 35 years and was Dean for ten years (1981-1990) at the St. John's University School of Law. I have been an author or co-author of numerous legal treatises, and I am considered by some to be an authority on the law of real property and surrogate's practice. I have brought this action to obtain redress against the ABA defendants for causing me to be deprived without due process of law, of my "property" (including my position as Dean of St. John's University School of Law and professional opportunities) under:

42 U.S.C. § 1983, Section 6 of Article I of the New York State Constitution; and under the common law of the State of New York. I submit this affidavit based on my personal knowledge.

2. When I earned my law degrees and started teaching law school back in the 1950's, America was in a very different era: the Cold War was intense; anti-communism was deemed a virtue in most circles, certainly among devout Catholics; and a rumor or allegations that an individual was a communist or communist sympathizer (or otherwise disloyal to the United States) could destroy a person's livelihood. It was also an era in which important U.S. Supreme Court precedents were handed down recognizing the need for due process constraints when governmental action stigmatized a person as "subversive" or "disloyal" and, as a consequence in those times, inevitably inflicted economic harm. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Wiesman v. Updegraff*, 344 U.S. 183 (1952). As important as was the governmental goal of effectively defending and promoting the "free world," fundamental constitutional values called for the fair treatment of individuals, in the form of procedural due process, so that individual lives were not wrongly destroyed. The same values apply in the 1990's in implementing state policy for assuring that those licensed to practice law are fully equipped, by appropriate legal education, to serve their clients and the public interest.

3. My entire career -- from the 1950's to the 1990's -- has been spent in the field of legal education, and for over thirteen years, I have been involved in the work of the Section of Legal Education and Admissions to the Bar of the American Bar Association. This case was in many ways painful for me to bring, not only because I know the people involved but also because I have been an active member of the American Bar Association ("ABA"). I have brought this case, however, to enforce effective procedural due process constraints -- already implicitly recognized by the ABA's "Rules of Procedure for Approval of Law Schools" and the "Policies of the Council of the Section of Legal Education and Admissions to the Bar and

of the Accreditation Committee" -- on the power delegated to the ABA by the states to grant, deny, continue or discontinue the accreditation of law schools. This power is the power to decide whether a law school shall live or die, for without ABA accreditation a law school cannot warrant that its graduates will be eligible to be admitted to the Bar.

4. I believe that the ABA cannot be allowed, without effective legal redress being available, to violate its own Rules of Procedure and Council Policies; act with personal bias, rather than the required objectivity; rely for its findings on an anonymous document critical -- in misconceived ways -- of a Law School Administration (while directing the Law School Dean not to respond to such document); receive anonymous phone calls and other documents critical of the Law School administration and not give an opportunity to the Law School Dean to address the criticisms; and fail to give a Law School Dean and his administration an opportunity to be heard concerning the various matters being addressed in the inspection and evaluation of the law school. The consequence of that kind of behavior, offensive to fundamental notions of due process, can be the victimization of an individual such as myself, who had significant accomplishments as Dean, but who was removed from that position by a brand new University administration solely to placate the ABA.

5. I also believe that, without effective legal redress being available, the ABA cannot be allowed to fail to provide an adversely mentioned person in an ABA inspection a proper opportunity to be heard before the ABA Accreditation Committee reviewing the ABA inspection findings, and the ABA cannot be allowed to breach its own rules of confidentiality with impunity when those breaches continue the victimization of an adversely mentioned individual.

6. As the ABA is effectively clothed by the states with authority that may be abused, as it was in my case, it should be subject to constitutional due process imperatives.

I

MY BACKGROUND AND DEANSHIP AT ST. JOHN'S UNIVERSITY

. . .

9. My immediate predecessor as Dean of St. John's University School of Law was Dean John J. Murphy, who served as Dean until he died of cancer in 1980. Dean Murphy was only the fourth Dean in the history of St. John's Law School. In early 1981, I became the fifth Dean after a Dean Search Committee chaired by Professor Edward Fagan recommended me. The historical custom has been that St. John's Law School deans hold their positions until death or terminal illness. The only exception was Father Joseph T. Timmelly, C.M., who left the Deanship because the Vincentian Fathers transferred him to a different religious post.) Thus, when I became Dean in early 1981, it was in the context of an established tradition and practice by which St. John's University and I expected that I would continue as a Dean until I retired, quit of my own volition or died. The expectation was not reduced to a written contract because St. John's University, a private Catholic institution, also had a practice of not having formal written contracts respecting employment relations.

10. Before I agreed to accept the Deanship, I met behind closed doors, with Father Joseph Cahill, C.M., then President of St. John's University, to make certain we agreed on the nature and content of that job. Father Cahill agreed that the Law School would be run by me with no University interference and that the post would be mine until I retired. He said, however, that he would inquire from time to time as to how well our graduates were making out in the job market. He would also check up from time to time as to whether excessive in-breeding was taking place on the faculty (*i.e.*, excessive hiring of our own law school graduates). Among the other things we agreed upon was that I could continue teaching my Seminar at Columbia and my publishing career.

11. Over the ten years that I was Dean of St. John's, I had instant access to Father Cahill, who served as University President throughout almost all that period. Until his retirement in 1989 (after 24 years as University President), Father Cahill and I discussed directly, in closed-door one-on-one conversations, all major plans and problem areas concerning the School of Law. Over the years, I had served as a close adviser to the President and carried out many special tasks for him (such as acquisition of the T.V. Center as a gift from Theodore Kheel and Automation House). Our relationship grew into a confidential relationship, imbued with mutual trust, confidence and fiduciary duties. In October 1981, I received the President's Medal from Father Cahill reflecting my honored position at St. John's University. (*See* Exhibit B attached hereto.) One of his last official acts in 1989 was to confer the University's honored "Pretas" medal upon me.

12. I have read the Affidavit of John P. Connolly, currently the Treasurer at St. John's University, purporting to opine that I was an "at-will" employee. As far as I know, Mr. Connolly is not a lawyer and not competent to render a legal opinion respecting the nature of my employment as Dean. Indeed, while I was the Law School Dean, Mr. Connolly was not Treasurer of St. John's University and he was not in a position to know the nature of my agreement with the University. He certainly was not privy to my discussions with University President Cahill concerning a wide variety of matters, including the subject of my tenure as Dean, and played no part in my later agreement with the University providing for secretarial and research assistance. Mr. Connolly's opinion thus is not based on personal knowledge of my specific understanding with Father Cahill and is not rendered by a qualified legal expert. It should be disregarded.

13. The truth is that Mr. Connolly's opinion that I was an "at-will" employee is simply wrong. The St. John's University administration (particularly in the persons of Father Cahill and my immediate superior, Dr. Carl Robusto) and I regarded my position as Dean as an appointment until I died or freely chose to retire, not as an employment at will. At no

time did I freely choose to retire as Dean or advise anyone that I had reached such a conclusion.

14. After I became the Dean of the School of Law, I labored to enhance the School's reputation and the quality of the education offered to our students. Among other things, I: (a) recruited large numbers of minority and women faculty members; (b) increased the admission and retention of disadvantaged students and originated the nationally recognized United Negro College Fund Scholarship Program; (c) recruited scholars, practitioners and members of the judiciary, to provide St. John's Law School with a diverse, bright and talented faculty (three former deans of other law schools were on the faculty at the time of the Sowle-led inspection); (d) increased the number of faculty so as to reduce the faculty-student ratio from 45:1 down to 26:1, the ratio called for in the ABA Standards; (e) established tutorials so as to aid all students (including minorities) in improving their performance in law school; (f) expanded the law school curriculum and multiplied the elective offerings; (g) had graduating classes every year which had a higher percentage passing the New York State Bar examination than any other law school in the country; (h) retrofitted the law school to create 22 new faculty offices, (i) installed a cafeteria and student lounge, after raising the funds for the same; and (j) raised approximately ten million dollars towards the cost of an addition to double the size of the law school plant. . . .

15. Until defendant Claude Sowle conducted the site team's March 31, 1990 "exit interview" with the St. John's University President, Executive Vice President and Academic Vice President, my tenure as Dean of the St. John's Law School was secure, because of: (a) the established tradition and practice relating to the St. John's Law School Deanship; (b) my express agreement with Father Cahill when I was appointed Dean in early 1981 on recommendation of the Dean Search Committee; (c) my status as a confidant and trusted advisor to President Cahill; (d) my contract with Dr. Morris furnished me with the "perks of a Department Chairperson; and (e) the qualitative enrichment of St. John's Law School during my

tenure as Dean. Indeed, the University expected me to continue as Dean indefinitely, while most Universities were finding it necessary to seek a new dean every three years because deans were resigning right and left. . . .

II.

"STATE ACTION" AND "DUE PROCESS" ASPECTS OF THIS CASE

21. As a Law School Dean for ten years, who was active in the ABA Section of Legal Education and who served on an ABA site inspection team at Seton Hall Law School, I am informed about state law requirements governing the admission of lawyers to practice, as well as the ABA accreditation and inspection processes. (*See* Dfs. Doc. Vol. I, Ex. 17, N. 2709, 2719.)[3] Based on that experience and information, I now show that the ABA accreditation and inspection process involves the exercise of power delegated to it by the states (and in particular New York State), and that New York State is inextricably "entwined" with these ABA functions and procedures.

A. **The ABA and Attorney Licensing.**

22. In the United States, each State or other admitting jurisdiction maintains requirements that an individual must meet in order to be licensed as an attorney-at-law and officer of the court. (*See* Dfs. Doc. Vol. III, Ex. 55, N.7892-7953.) Forty-five States now limit Bar admissions to graduates of ABA approved law school, either by supreme court rule, statute or policy of the Board of State Bar Examiners. (*See* Dfs. Doc. Vol. III, Ex. 53, N.7858, 7871-73.) In the other jurisdictions, the nearly exclusive means by which individuals are permitted to take the Bar examination is to graduate from

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[3] For convenience, I refer in this affidavit to the Appendix of defendants' documents submitted by my counsel in opposition to defendants' motion ("Dfs. Doc. Vol. __, Ex. __, N. __.")

an ABA approved law school. (*See* Dfs. Doc. Vol. III, Ex. 55, N.7892-7953.)

23. In recent years, almost all states, including New York State, have come to rely exclusively on the ABA for the inspection and accreditation of law schools, in order to maintain the quality of law schools for the training of future officers of the Court. (*See* Dfs. Doc. Vol. III, Ex. 65, N.9650, 9653; Dfs. Doc. Vol. III, Ex. 53, N.7858, 7871-73.) In New York State, as a practical matter, a degree from an ABA-accredited law school is a sine qua non.

24. To become a member of the New York Bar, compliance with the Rules of the New York Court of Appeals on admission to practice is required. (Ct. App. § 520.1) The typical means by which an individual complies with those Rules is by graduating from an ABA approved school and then taking the Bar examination.

25. To be eligible to take the Bar examination, in New York the applicant is required to satisfy one of three conditions: (a) study at an "approved law school" (Ct. App. § 520.3); (b) "law office study" (Ct. App. § 520.4); or (c) law study in a foreign country. (Ct. App. § 520.4). When these alternatives are analyzed, it is clear that the New York Court of Appeals requires study at an ABA-accredited law school:

(a) An "approved law school" is defined not only as "approved by the American Bar Association," but also a law school that satisfies one of the following other categories: approval by the New York Court of Appeals; membership in the Association of America Law Schools ("AALS"); or approval by the New York Department of Education. *However*, in practice these three categories do not exist separate and apart from approval by the ABA. In New York, there are 15 law schools approved by the ABA; the New York Court of Appeals and New York Department of Education have *not* and do *not* approve any law school in New York -- or elsewhere -- that is not approved by the ABA (and especially do not do so because Court of Appeals Judge Bellacosa is the Vice-Chairperson of the ABA Accreditation Committee). Nor, in

practice, is membership in the AALS a separate category. In order to break into and receive the higher classification of AALS membership a school must successfully complete several years of operation as an ABA approved school. Moreover, when a school is an AALS member, ABA site inspections are conducted with an AALS representative on the Site Team; as reflected in this case, AALS acts in complete concert with the ABA (*See* Dfs. Doc. Vol. III, Exs. 59-60, N. 9111-13) and has no independent set of State Inspection Teams.

(b) "Law office study" -- which provides a very small number of Bar applicants -- still requires "attendance in approved law school" for at least one year (Ct. App. § 520.4(c)). As I have just shown, in New York practice, only a law school accredited by the ABA is an "approved law school." Hence, to become a member of the New York Bar by "law office study," an applicant is required to attend an ABA-accredited school for one at least year. Nor is it likely that the Legislature will ever at to change or liberalize the foregoing rules. When the Legislature recently inquired about the adequacy of present law school oversight it was politely told by the ABA and the Court of Appeals not to "poach" on their domain.

(c) "Law study in a foreign country" requires either attendance at an ABA-accredited school or -- subject to stringent requirements -- its equivalent.

26. Attached as Exhibit C is an ABA document entitled: "A Review of Legal Education in the United States," that I received as a member of the Section of Legal Education of the ABA, providing statistics on American law schools and reviewing their accreditation status. The document shows, and I know from my own knowledge, that there are fifteen ABA-accredited law schools in New York: Brooklyn Law School; The City University of New York School of Law at Queens College; Columbia University School of Law; Cornell University Law School; Fordham University School of Law; Hofstra University School of Law; New York Law School;

New York University School of Law; Pace University School of Law; St. John's University School of law; State University of New York at Buffalo School of Law, Syracuse University College of Law; Touro College Jacob D. Fuchsberg Law Center; Union University Albany Law School; and Yeshiva University Benjamin N. Cardozo School of Law. (Ex. C, pp. 38-42.)

27. An individual may be admitted to the New York Bar, in the discretion of the Court without taking the Bar examination (Ct. App. §520.9). However, the Court of Appeals Rule specifically provides that any such individual must not only have practiced for a number of years in another state (where it is likely that there is a requirement of a degree from an ABA-accredited school), but must, in fact, be a graduate of an ABA-accredited law school (Ct. App. § 520.9(a)(ii)).

28. I recently contacted the State Board of Law Examiners to obtain data on new York State Bar Exam qualifiers in the period 1989 to 1992. The Board's response, set forth in Exhibit D of this affidavit, reveals the following statistics:

(a)	Number of Applicants who graduated from an ABA Approved Law School	(1989) 8649 (1990) 8381 (1991) 8616 (1992) 8646
(b)	Number of Applicants who qualified via successful completion of one year of study in an ABA approved Law School plus three years of Law Office Study	(1989) 62 (1990) 45 (1991) 71 (1992) 51
(c)	Number qualifying via graduation from a *non-ABA* approved in-State Law School	(1989) 0 (1990) 0 (1991) 0 (1992) 0

29. The United States Department of Education recognizes the ABA as the national accrediting agency for professional schools of law. (*See* Dfs. Doc. Vol. III, Ex. 56, N.7954,

7975-76.) Those of us in legal education know that this is important because of the federal statutory basis for approval of federal funds for educational purposes, which has caused the Department of Education to become involved in accreditation matters (*see* Dfs. Doc. Vol III, Ex. 69, N. 9906).

30. Papers submitted by defendants on this motion create some misimpressions about how the ABA functions in inspecting and accrediting law schools:

(a) Defendants seem to suggest that the ABA's inspection and accreditation decisions can be or are ignored by the various state judiciaries; by boards of law examiners; and by other relevant government agencies. In truth, if accreditation is not granted or is revoked by the ABA, graduates of that law school will not satisfy the requirement of a degree from an ABA-accredited school in order to become a licensed attorney. There is no review of ABA inspection and accreditation decisions by the state judiciaries, by boards of law examiners or by other relevant government agencies (including the New York Department of Education).

(b) Defendants seem to suggest that because the ABA does not have "power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual," the ABA wields no power or clout in the inspection and accreditation process. In fact, by virtue of the ABA's unreviewed power to grant, withhold, continue or discontinue accreditation -- a power delegated to it by the New York Court of Appeals -- the ABA wields effective authority to obtain "voluntary" cooperation from inspected law schools and affected individuals, without the need for any subpoena or sanctions power. As a Law School Dean, and as a member of the "site evaluation team" for Seton Hall Law School, I was very much aware that the ABA was clothed with delegated state power. What happened at St. John's University in 1990 is a good example of its force -- a demonstration of the fact that even rumors of trouble with the ABA can rock a school down to its foundation.

(c) Defendants say that the States, not the ABA, determine admission to the Bar. That assertion ignores the key fact that the States have delegated to the ABA responsibility concerning one essential requirement for admission -- legal education -- and look to the ABA's law school accreditation process to determine eligibility to take the required law examinations of applicants for admission to the Bar. (*See* Dfs. Doc. Vol. III, Ex. 57, N.8180-81.)

(d) Defendants say that the ABA does not receive state funding of its accreditation activities. However, the ABA Accreditation committee does receive the time of judges of the highest state courts who are compensated by the states. *See*, for example, Judge Rosalie Wahl (Minnesota); Judge Dennis Archer (Michigan); Judge Joseph Bellacosa (New York).

31. From time to time there has also been recognition by the ABA itself of its "delegated" state responsibility. *See* Dfs. Doc. Vol. III, Ex. 47, N.7740; Dfs. Doc. Vol. III, Ex. 49, N.7768, 7770; Dfs. Doc. Vol. III, Ex. 57, N.8180-81; Dfs. Doc. Vol. III, Ex. 65, N.9650, 9653.

32. The ABA holds itself out to the United States Department of Education, the State governments and the public as the appropriate agency for supervising the quality of law school education so that only qualified individuals may become licensed attorneys-at-law. Furthermore, the ABA has continually lobbied (both publicly and privately) as to the need for it to be the *exclusive* agency for granting, denying, continuing or discontinuing the required "approval" of law schools for purposes of the admission of applicants for admission to the Bar. Thus, the ABA makes representations to the U.S. Department of Education (*see* Dfs. Doc. Vol. III, Ex. 56, N. 7975), lobbies with state governments (*see* Dfs. Doc. Vol. III, Ex. 51, N.7805-07), files briefs with courts and otherwise represents itself as the *only* qualified and appropriate body for supervising law school education (*see* Dfs. Doc. Vol. III, Exs. 52-54, N.7824-7891). In New York State, for example:

(a) In New York State in 1981, both houses of the State Legislature passed a Bill authorizing a graduate of *any* American law school (as opposed to an ABA approved school) to take the New York State Bar Examination. At that juncture, the ABA launched an all-out lobbying campaign to have the Governor veto the measure. Governor Carey, after some serious hesitation, vetoed the Bill, because of the lobbying campaign set in motion by the ABA. I have personal knowledge of this having been personally solicited by James White of the ABA to "pull out all the stops" to get Governor Carey to veto the Bill. (Attached hereto as Exhibit E is the legislative report.) This veto makes clear the fact that in New York State, the ABA -- by reason of its delegated power to grant, deny, continue or discontinue accreditation -- exercises state power to control admittance to the Bar and will vigorously fight off any attempt to change the status quo.

(b) More recently, on or about December 18, 1987, when New York State was considering a change in its law governing requirements for admission to the Bar (so that there would not be exclusive reliance on ABA accreditation, James P. White, as the ABA Consultant on Legal Education, sent a letter to Senator Kenneth P. LaValle, the Chair of the New York Senate Committee on Higher Education. Attached as Exhibit F is the copy of that letter that I received from New York Court of Appeals Judge Joseph Bellacosa; defendants' file copy may be found at Dfs. Doc. Vol. III, Ex. 51, N.7805-07. Defendant White's letter to Senator LaValle states, in part:

> Judge Joseph W. Bellacosa of the New York Court of Appeals asked that I write you concerning the role of the American Bar Association in the law school accreditation process.
>
> The ABA's accreditation process calls for a periodic evaluation of approved law schools, with an on-site visit scheduled every seven years. Provisionally approved law schools are visited annually. After schools are fully approved, visits are

> conducted after the third and fourth years and then on the regular seven-year schedule.
>
> Joint visits also are made on behalf of the Association of American Law Schools to law schools that are members of that organization. . . .
>
> Today, students attending one of the 174 ABA-approved law schools can obtain an education that measures up to standards, promulgated and *enforced* by the legal profession.
>
> Additionally, the U.S. government recognizes the ABA as the sole agency for accreditation of law schools.

(Emphasis supplied.)

(c) In the mid-1980's, the ABA filed an amicus brief with the Nevada Supreme Court, opposing the petition of an *unaccredited* law school in Nevada which sought to allow its graduates to be admitted to the Bar of the State of Nevada. Up until that time, the State of Nevada had limited its Bar admissions to graduates of law schools approved by the ABA. Here the ABA argued that it would be *contrary to Nevada law and public policy* to allow an exception to a law school which had failed to apply for ABA accreditation (an application that would have subjected that law school to ABA standards and inspection.) A copy of that *amicus* brief may be found at Dfs. Doc. Vol. III, Ex. 54, N.7874-91. The Nevada Supreme Court adopted the ABA position and denied the petition, thereby confirming that the State of Nevada had delegated to the ABA the power to approve or disapprove of law schools for purposes of admission to the Bar.

33. New York State judges are intimately involved in the work of the ABA's Section of Legal Education and Admission to the Bar. For a number of years, New York Court of Appeals Judge Joseph Bellacosa has been and remains a member of the ABA Accreditation Committee. Former New York Court of Appeals Chief Judge Sol Wachtler was a member of the Section's McCrate Task Force on the practical

training of law students, which recently published a detailed report. Current Chief Judge Judith Kaye is heavily involved in ABA activities and at the time this controversy arose held an executive position with the ABA itself. The official biographies of most of the other Judges currently sitting on the New York Court of Appeals indicate membership in, and participation in, the ABA.

34. Through a variety of other activities, the ABA significantly *influences* the governing State law procedures for individuals who seek to become and remain licensed attorneys-at-law. Among these may be listed the following: involvement in the composition of the LSAT examination, the Multi-State and MPRE examinations; the interaction with the National Conference of Bar Examiners; formulation of National Standards of Judicial and Professional Ethics; the cooperation with the American Law Institute concerning Continuing Legal Education requirements; and the enforcement of state laws against the unlawful practice of law. (*See* Dfs. Doc. Vol. III, Ex. 55, N. 7897-99; I received my own copy of this document and receive this type of document every year from the ABA Section of Legal Education.)

B. **The ABA Inspection and Accreditation Process.**

35. The process instituted by the ABA to supervise the quality of law schools is premised upon an express commitment -- a promise -- by the ABA to provide "due process" to the affected institutions and individuals that come under the scrutiny of ABA inspection and accreditation. It is understood by those involved in legal education (and who are vitally affected by the ABA inspection and accreditation process), that the ABA promises "due process." That is why, when Defendant White wrote to New York State Senator LaValle about the ABA accreditation work, he enclosed with the letter (*see* Exhibit F) the ABA Rules of Procedure and Council Policies. That is also why Judge Bellacosa, after remarking that the "states highest courts rely on [the ABA accreditation] process under an unwritten, implied delegation", stressed that the courts "need assurance that it is . . . imbued with due process

and equal protection. . ." (Dfs. Doc. Vol. III, Ex. 65, N.9650.) The ABA has -- and retains -- the life and death power to approve or disapprove law schools, in part, because of its promise to provide due process.

36. In an effort to maintain minimum standards for faculty, facilities, and programs, and to protect students, the public, and the legal profession from substandard law schools, the ABA maintains a Council of the Section of Legal Education and Admissions ("Council") and an Accreditation Committee. The Council and Accreditation Committee carry the responsibility for inspecting and evaluating law schools and also recommending to the ABA House of Delegates those law schools eligible for accreditation. (*See* Dfs. Doc. Vol. III, Ex. 54, N.7880-83.)

37. After a law school, such as the St. John's University School of Law, is accredited by the ABA, continuation of that ABA accreditation occurs after a periodic determination by the ABA that a school continues to comply with the minimum requirements of a basic legal education. That determination is made based upon: (a) a self-study by the school of its educational program and the goals of the Law School, and (b) an independent review and evaluation by the ABA Accreditation Committee, and (c) approval by the Council of the ABA Section of Legal Education and Admissions to the Bar and ultimately by the House of Delegates to the ABA. (*See* Dfs. Doc. Vol. III, Ex. 47, N. 7699-7700; Dfs. Doc. Vol. II. Ex. 45, N. 7404-05.)

38. The ABA has written Standards for Approval of Law Schools ("Standards"). (Dfs. Doc. Vol. II, Ex. 45, N.7231-7373 (Nov. 1988); Dfs. Doc. Vol. II, Ex. 46, N.7484-7504 (Sept. 1989 rev.); Dfs. Doc. Vol. III, Ex. 47, N.7516-7668 (Oct. 1990)). These Standards also set forth the criteria under which a law school can achieve and maintain a minimum level of acceptable legal education. The Standards include the following general categories: Organization and Administration, Educational Program, Faculty, Admissions, Library, and Physical Plant. If a law school meets these Standards,

qualified students should derive the benefits of a thorough introduction to fundamental areas of the law; access to a current, comprehensive law library; experience in legal research and legal writing; instruction and counseling from knowledgeable instructors; and interaction with fellow students striving to acquire the analytic skills of the profession. (*Id.*)

39. The ABA also has written Rules of Procedure for Approval of Law Schools ("Rules of Procedure"). (Dfs. Doc. Vol. II, Ex. 45, N.7374-7439 (Nov. 1988); Dfs. Doc. Vol. II, Ex. 47, N. 7505-09 (Sept. 1989 rev.); Dfs. Doc. Vol. III, Ex. 47, N.7669-7723 (Oct. 1990)). These Rules of Procedure govern the procedural aspects of the accreditation and evaluation process. Their objective is to insure that the ABA acts fairly and affords due process while carrying out its function. Of particular relevance to this action are Rules 26, 34 and 36 of the ABA Rules of Procedure which provides as follows:

> (a) Rule 26 governs the periodic evaluation of fully approved law schools and requires, *inter alia*, that the ABA "site evaluation" team (i) be composed of "objective" persons, and (ii) consult with the law school dean during the site evaluation.
>
> (b) Rule 34 governs the handling of complaints concerning approved law schools. It requires that complaints that allege facts indicating a law school's non-compliance with ABA Standards be referred to the law school's administration for comment and that communications that do not allege facts indicating such non-compliance be disregarded.
>
> (c) Rule 36 restricts access to site evaluation reports and ABA Accreditation Committee and Council action reports so as to preserve confidentiality. (Dfs. Doc. Vol. II, Ex. 45, N.7404-05, 7418-19, 7421; Dfs. Doc. Vol. III, Ex. 47, N.7699-7700, 7713-14, 7716.)

40. The ABA also has written Policies of the Council of the Section of Legal Education and Admissions to the Bar and of the Accreditation Committee (the "Council Policies"). (Dfs. Doc. Vol. II, Ex. 45, N.7440-70 (Nov. 1988); Dfs. Doc. Vol. II, Ex. 46, N.7510-15 (Sept. 1989 rev.); Dfs. Doc. Vol. III, Ex. 47, N.7735-66 (Oct. 1990)). Council Policy Number 3 recognizes that "[t]hose who have significant responsibility in the process leading to accreditation of law schools serve a vital and quasi-judicial function in the legal system of the United States" and that "[i]t is important to the fair and effective functioning of the system of law school accreditation and to the maintenance of public and professional respect for that system that those who act in it act impartially and avoid even the appearance of impropriety." Also, Council Policy 12, entitled "Confidentiality of Site Evaluation Reports and Letter Reporting Action," provides for the maintenance of confidentiality, while affording an individual who is criticized in the site evaluation an opportunity to reply. (Dfs. Doc. Vol. II, Ex. 45, N.7445, 7457-58; Dfs. Doc. Vol. III, Ex. 47, N.7740, 7753-53.). . . .

VI.

MY PLACEMENT ON "LEAVE"; MY REMOVAL AS DEAN

70. In the years just before the ABA site inspection took place, St. John's University had had a number of accreditation issues arise with its other graduate schools and could not afford any cloud on the reputation and standing of the Law School. As a result, the senior officials at St. John's University were especially sensitive to any possible question about the continued accreditation of the Law School, which was considered to be the University's best known graduate school.

71. Following the "exit interview" of the ABA site inspection Team with the University President, the dissidents leaked rumors around the Law School that it was in danger of losing its accreditation. Also, although neither Dr. Fagan nor I were apprised of the full content of the Team's Exit Interview with the President. I was told by members of the University

administration about further phone communications between University President Harrington and ABA representatives just after the Team left town.

72. On Friday, April 13, 1990, while I was in California on the Easter break, I received a telephone call informing me that I was to be put on immediate "leave" from my position as Dean of St. John's University Law School and that I was to report to the office of University Vice President Barbara Morris on Monday, April 16, 1990, for the details. In light of everything that had transpired during the Team's visit, I immediately retained the services of Boris Kostelanetz, Esq.

73. On Monday, April 16, 1990, Boris Kostelanetz and I appeared in the office of Barbara Morris as scheduled. The University position was essentially non-negotiable -- I was to go on immediate "leave." This directive was given two weeks after the Sowle Team "exit interview" with President Harrington. Moreover, it was clear to Boris Kostelanetz and me from what Dr. Morris said that the University's action resulted from the Sowle Team's oral report at the exit interview (which, in turn, was based largely upon the "Anonymous Dissident Document").

74. The next day, Tuesday, April 17, 1990, University President Harrington issued a letter to me stating the formal terms of the "leave," which diplomatically stated that I could return to my position as a tenured professor if I did not "wish" to return as Dean. Attached as Exhibit P hereto is University President Harrington's letter, dated April 17, 1990, to me. Father Harrington also issued a public announcement that he had granted a research leave to me and had appointed Vice Dean Fagan as Acting Dean of the School of Law. The University President's statement included the comment:

> During the ABA/AALS site team exit meeting with me, the team emphasized the strength of the School of Law's teaching-learning environment, excellent library services, effectiveness in supporting multicultural student populations, high pass rates on the bar examinations, racial and ethnic diversity among

> the faculty, increase in faculty research productivity, and strides in the development of placement services. Approval was also given to the plans for the expansion of School of Law physical facilities and development program.

(*See* Dfs. Doc. Vol. II, Ex. 24, N. 3071.)

75. Shortly thereafter, I received a telephone call from New York practitioner, Edward Schlesinger, Esq., who had been in Florida on Monday, April 16, 1990 -- the day Dr. Morris told me I was placed on "leave." Mr. Schlesinger told me that he had run into Claude Sowle outside of Sowle's office in the Miami Law School office. Mr. Schlesinger, described the conversation (which he quotes in his affidavit in opposition to defendants' motion). He told me that he was taken aback by Claude Sowle's behavior because Claude Sowle was making comments about me of a personal nature, suggesting a personal envy and resentment of me. He also told me that he believed Claude Sowle was "a loose cannon on the gun deck" and that I should understand where Sowle was "coming from" if we had any future professional dealings. Mr. Schlesinger said he was mailing me his diary notes of the conversation. I told Mr. Schlesinger about my being put on "leave" as a result of the Sowle-led ABA inspection. (Schlesinger Aff. ¶ 8 & Ex. B.)

76. On April 23, 1990, the *New York Law Journal* announced "St. John's Dean Takes Leave Abruptly." (Attached as Exhibit Q hereto is a copy of this *New York Law Journal* article.) The article, after reporting in the first sentence, that I "began an unexpected 17-month sabbatical last week," then continued, in the second sentence, to state: "The leave began after an inconclusive visit by the American Bar Association late last month." The article proceeded to discuss, among other things, the 60-page "Anonymous Dissident Document." Consequently, rumors continued that the St. John's University School of Law was in danger of losing its ABA accreditation and that I was thus being suspended and would later be forced out as Dean. (*See* Ex. Q.)

77. On April 27, 1990, Jim White wrote a memo to the file purporting to report certain conversations he had with Acting Dean Fagan and University President Harrington. (*See* Dfs. Doc. Vol. I. Ex. 22, N. 2796-98.) Although I was never advised of that memo and given an opportunity to comment on it (I first learned of it as a result of document production in this case), the memorandum was included with the Sowle Report submitted to the ABA Accreditation Committee. (*See* Dfs. Doc. Vol. II, Ex. 24, N. 3062-63.) Defendant White's memo misrepresented the events at the time. Acting Dean Fagan did express concern about the stress placed on me by the dissidents; but in fairness to both of us, we were both feeling the pressure. (In May 1990, Acting Dean Fagan went into the hospital for triple by-pass heart surgery.) But that pressure could not accurately be turned into a question of my "mental stability," as defendant White puts it, nor of Acting Dean Fagan's mental stability. Also, Acting Dean Fagan's statements on the Self-Study at Self-Study meeting during site inspection were not a matter of a public confrontation with me. Rather, then Vice Dean Fagan had attempted to cool matters down and was not allowed to explain why faculty members were to blame for any inadequacies of the Self-Study. Furthermore, what Jim White described as a meeting involving University President Harrington, then Vice Dean Fagan and myself did not happen (what did happen is stated in ¶ 73 above). I do acknowledge that Jim White issued a press release on April 24, 1990, announcing St. John's University School of Law was a fully approved law school and that my leave was an internal matter to the Law School and did not relate to the approval status of the school. (*See* Dfs. Doc. Vol. I, Ex. 22, N.2796-98.) But it occurred only after I was put on "leave." Finally, Jim White's April 27th memo also stated that the term of my leave included the term that I would resign. (*see* Dfs. Doc. Vol. I, Ex. 22, N.2797), which was not my understanding at that time.

78. In the following months, discussions were held between my lawyer, Boris Kostelanetz, and the administration of St. John's University concerning my removal from the Law School's Deanship. (While my "removal" as Dean accorded

with Mr. White's April 27th statement of the terms of my "leave", it was not required by the express language of University President Harrington's April 17th letter to me.) The University administration made it clear that if I did not resign, I would be immediately terminated. In the words of Herbert Schwartzman, General Counsel to St. John's University, written to Boris Kostelanetz and of course shown to me:

> I think you would agree it would be in Pat's best interests if he were to resign rather than have the University announce his termination as Dean.

(*See* Kostelanetz Aff. Ex. B.) Although former Governor Hugh Carey and University Trustee Eugene Sullivan agreed to, and did, act as mediators in August 1990, the University remained adamant in its position as stated in Mr. Schwartzman's letters.

79. Despite Mr. Schwartzman's letter, I believed -- and believe -- that the University could *not* remove me from the Deanship without "cause" and that no such "cause" existed. I nevertheless "retired" from the Deanship of the St. John's University School of Law because I had eight children to support (including several in college), and couldn't afford the immediate loss of the bulk of my income. I also hoped to avoid public controversy over my termination, while the Law School's status was under review. The public announcement of my "resignation" was made on September 4, 1990, and included a letter prepared by the University for me and dated August 27, 1990, to mask the reality that the University had demanded my resignation; that is, terminated me as Dean of the Law School.

80. No one, however, should think that I wanted to retire; I very much wanted to continue my Deanship. All the statements to the contrary were in the nature of puffery and press releases to satisfy the University. My health was not a factor, and I had several tasks as Dean to complete in the coming years, not the least of which was to see the new law school building through to completion and to establish a graduate

division at the Law School. It really was a heart-breaking matter created by the Sowle Team.